

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1155

No. 76-1155

hms

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE APPLICATION OF THE UNITED STATES
OF AMERICA IN THE MATTER OF AN ORDER
AUTHORIZING THE USE OF A PEN REGISTER
OR SIMILAR MECHANICAL DEVICE.

: APPEAL FROM THE
UNITED STATES
: DISTRICT COURT
FOR THE SOUTHERN
: DISTRICT OF NEW YORK

APPENDIX



GEORGE E. ASHLEY
Attorney for Movant-Appellant
NEW YORK TELEPHONE COMPANY
1095 Avenue of the Americas
New York, New York 10036

Frank R. Natoli
Robert E. Scannell
of Counsel

PAGINATION AS IN ORIGINAL COPY

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APPLICATION OF THE UNITED STATES
OF AMERICA IN THE MATTER OF AN
ORDER AUTHORIZING THE USE OF A
PEN REGISTER OR SIMILAR MECHANICAL
DEVICE
-----X

Misc. No.

19-97(44)

ORDER

AUTHORIZING USE OF A PEN REGISTER

TO: Special Agents of the Federal Bureau of Investigation,
United States Department of Justice

Affidavit having been made before me by Walter F.
Smith, Special Agent of the Federal Bureau of Investigation, United
States Department of Justice, and full consideration having been
given to the matters set forth therein the court finds:

(a) there is probable cause for belief that

), and others

as yet unknown have committed, are committing, and
will continue to commit offenses listed in Section 2516
of Title 18, United States Code, involving the use of
facilities in interstate commerce in order to promote,
manage, establish and carry on an unlawful activity,
to wit: a gambling enterprise in violation of
Section 1952 of Title 18, United States Code, and
are conspiring to commit such an offense in violation
of Section 371 of Title 18, United States Code;

(b) there is probable cause to believe that the tele-
phones subscribed to by and located at

New York, New York, and bearing

telephone numbers _____ and
have been, are being, and will continue to be used
by _____
Unknown), and others as yet unknown in commission of
the above described offenses.

WHEREFORE, it is hereby ordered that the New York Telephone Company, a communication carrier as defined in Section 2510 (10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the service that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the New York Telephone Company to be compensated for by the applicant at the prevailing rates.

WHEREFORE, it is further ordered that Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized to:

(a) install mechanical devices on the telephones subscribed to by _____ and located at _____ New York, New York, and bearing telephone numbers _____ and _____ which telephones have been, are being, and will continue to be used at said address.

(b) operate such mechanical device until the telephone numbers of all outgoing calls dialed lead to the identities of the associates and confederates of

, and their places of operation,
or for a period of twenty (20) days from the date
of this Order, whichever is earlier.

Provided that the operation of this device must
terminate upon attainment of the authorized objective, or in
any event, at the end of twenty (20) days from the date of
this Order.

Dated: *March 19, 1976*

S/c Charles H. Terney
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
APPLICATION OF THE UNITED STATES OF
AMERICA IN THE MATTER OF AN ORDER
AUTHORIZING THE USE OF A PEN REGISTER
OR SIMILAR MECHANICAL DEVICE.
-----X

Misc. No. 19-97(44)

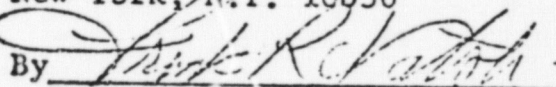
NOTICE OF SPECIAL
APPOINTMENT

To: WILLIAM I. ARONWALD, ATTORNEY IN CHARGE
JOINT STRIKE FORCE AGAINST ORGANIZED
CRIME AND RACKETEERS
Southern District of New York
St. Andrews Plaza
New York, N.Y.

You are hereby notified that we will call up for a Special Appointment, before the Honorable Charles H. Tenney, one of the Judges of the above-styled court, in his Chambers in the United States District Court, Foley Square, New York, N.Y., on Tuesday, the 30th day of March, 1976, at 3:00 P.M. o'clock, the following: New York Telephone Company's motion to vacate that part of the order dated March 19, 1976, directing Telephone to affirmatively assist the Federal Bureau of Investigation in the installation of a pen register to certain telephones, and to stay said order pending the hearing of this motion.

We hereby certify that a copy hereof has been hand delivered to the office of William I. Aronwald this 29th day of March, 1976.

GEORGE E. ASHLEY
Attorney for NEW YORK TELEPHONE
COMPANY
1095 Avenue of the Americas
New York, N.Y. 10036

By 
Frank R. Natoli, Of Counsel

OFFICE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In RE:

APPLICATION OF THE UNITED STATES
OF AMERICA IN THE MATTER OF AN
ORDER AUTHORIZING THE USE OF A
PEN REGISTER OR SIMILAR MECHANICAL
DEVICE.
-----X

ORDER TO SHOW CAUSE

WITH A STAY

Misc. No. 19-97(44)

Upon the annexed affidavits of FRANK R. NATOLI and
WILLIAM F. McGARTY, duly sworn to the 30th day of March, 1976,
and upon motion of GEORGE E. ASHLEY, attorney for the New York
Telephone Company, *IT IS HEREBY*
ORDERED, THAT
~~WILLIAM I.~~ WILLIAM I. ARONWALD, Attorney in Charge, Joint
Strike Force Against Organized Crime and Racketeers for the
Southern District of New York, show cause before this Court
at a Term for Motions to be held in Room *1105* of the United
States Court House, Foley Square, in the Borough of Manhattan,
City of New York, on the *31st* day of *March*, 1976, at
3:00 P.M. o'clock in the forenoon of that day, or as soon
thereafter as counsel can be heard, why the order of this Court
dated March 19, 1976, directing the New York Telephone Company
to furnish Special Agents of the Federal Bureau of Investigation
with all information, facilities (including lease lines) and
technical assistance necessary to effectively utilize a pen

register, should not be vacated, and why such other and further relief as to this Court may seem just and proper should not be granted.

Sufficient reason appearing therefor, it is

~~ORDERED that pending the hearing of this application,~~

omit ~~the aforementioned order of this Court, be and it hereby is stayed; and it is further~~

ORDERED that sufficient notice of this application shall be deemed to have been given if service of a copy of this Order to Show Cause and the papers upon which it was granted, is made at or before 4:PM on the 30th day of March, 1976, personally on WILLIAM I. ARONWALD, Attorney in Charge, Joint Strike Force Against Organized Crime and Racketeers for the Southern District of New York, at St. Andrews Plaza, New York, N.Y.

Dated: New York, New York
March 30th, 1976

CHARLES H. TENNEY
U.S.D.J.

7.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
APPLICATION OF THE UNITED STATES OF
AMERICA IN THE MATTER OF AN ORDER
AUTHORIZING THE USE OF A PEN REGISTER
OR SIMILAR MECHANICAL DEVICE.
-----X

Misc. No. 19-97(44)

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

FRANK R. NATOLI, being duly sworn, deposes and says:

1. I am employed by New York Telephone Company as an Attorney in the Legal Department, Litigation Section. From time to time during my career in the Legal Department, I have been involved in matters concerning our Security Division and its liaison with law enforcement agencies. I am fully familiar with the facts and prior proceedings herein and make this affidavit in support of Telephone's motion to modify or vacate this Court's order of March 19, 1976, made and entered in this proceeding.

2. Subsequent to March 19, 1976, I was informed by Kenneth J. Lucey, General Litigation Attorney, that a Special Agent of the Federal Bureau of Investigation, United States Department of Justice ("FBI"), had secured an order of this court to place a pen register on certain telephone numbers in the City of New York. I was further advised that Telephone had been served with said order on March 24, 1976, and that it might be

nessary for Telephone to appear in Court to modify or quash the said order.

3. I contacted William F. McGarty, Security Supervisor of Telephone who informed me that Telephone had, after the receipt of the order of March 19, 1976, (annexed hereto as Exhibit I), supplied the FBI with appearance information and/or terminal locations as was orally requested by the FBI Agent.

4. It must be noted that Telephone is further willing to provide the FBI with all information concerning the necessary pair and cable. Once this information is furnished, the FBI will have the full capacity to install a pen register without further assistance of Telephone.

5. The order, however, further directed Telephone to furnish the FBI with facilities which, in common parlance of Telephone terminology, includes lease lines and technical assistance in order to facilitate the installation of a pen register on the subject telephone lines. It is the position of the New York Telephone Company that facilities and technical assistance may only be furnished to law enforcement officials under a Title III application, pursuant to § 18 U.S.C.A., §§ 2510 et seq. (1970) (hereinafter, "Title III"). This section requires

a company such as Telephone to provide whatever technical assistance is necessary in order to permit the Government to install electronic surveillance equipment on telephone lines. Telephone has on several occasions in the past complied with numerous Title III court orders, but has not to my knowledge, furnished said assistance in non-Title III applications.

6. It must be pointed out that although the caption of the order indicates the Government is requiring facilities to install a pen register, the body of the order is worded in such a fashion that it directs Telephone to furnish the FBI with the capability to perform an interception. It is unquestioned that any order directing the interception of communications must be obtained under Title III. It is clear that the instant order was not obtained pursuant to the provisions of Title III. It is a jurisdictional requirement that a Title III order contain the prior approval of the Attorney General or a designated Assistant Attorney General, 18 U.S.C.A. § 2518. On its face the order is void since it does not have such prior approval contained therein. Further, the Court is without authority to compel any interception of communications without a valid Title III application. Accordingly, the instant order was not issued under Title III. Therefore, the Court cannot look to that statute for its

authority to issue the present order.

7. It may be contended that the Court had authority to issue the order pursuant to F. R. Cr. P. 41. This position is similarly untenable. Rule 41 is a codification of the Fourth Amendment to conduct a search and the Court may only authorize a civil officer or other federal law official to effect the search. Rule 41 cannot be construed to compel a private party (Telephone) to actively assist in conducting a search during a criminal investigation. Rule 41 does not authorize the Court to deputize Telephone and it applies only to law enforcement authorities. Further, Rule 41 provides for the search and seizure of "tangible" objects. It is seriously doubted that electronic pulses or tones registered by a pen register can be considered "tangible" within the meaning of that Rule.

7. Under the procedure of Rule 41 there must be an execution and a return within 10 days. This order provides for 20 days. Upon the seizure of the property, a receipt is required to be given and an itemized inventory must be made. All of these elements appear lacking in this case. Therefore, Rule 41 does not appear to be the basis for granting the Court jurisdiction to issue the order herein to Telephone.

8. The All Writs Statute cannot confer jurisdiction when the Court has none. Said statute is a non-jurisdictional one.

Hence, before the Court may utilize that statute, it must first find some other basis to grant jurisdiction. It is fundamental that district courts are courts of limited jurisdiction and possess only those powers which are enumerated in Article III of the Constitution of the United States and any additional powers which Congress may grant to them under the Constitution.

9. If there is no statutory authority to issue the present order, the next possibility is that the Court possessed some "inherent authority" to do so. As to this proposition, the Court of Appeals for the 9th Circuit, Application of United States, and 8th Circuit decision decided January 19, 1976, clearly established that the Court, in a non-Title III application, does not have "inherent authority" to issue an order utilizing use of a pen register by FBI authorities. These findings and the other points covered in the prior paragraphs are covered more fully in a memorandum of law which will be submitted.

10. To compel Telephone to actively assist in a criminal investigation when it refused to do so, absent statutory authority, deprives Telephone of its right to refuse without due process of law. Nor can the theory of posse comitatus be applied, since this is not a situation where the FBI is seeking aid to keep

the peace and it is not in pursuit and seeking arrest of a known law breaker. It is only under those situations where said principle might be applied. It has never been applied to compel private persons (Telephone) to help a law enforcement agency to investigate suspected criminals.

11. It must further be noted that if the district court's order of March 19, 1976 is not a "demand of other lawful authority" as required under § 605 Communications Act, then Telephone could be subjected to both civil and criminal liability. For some unexplained reason the Government has decided to proceed with a non-Title III application. It is strange because the crime which is being investigated, namely 18 U.S.C. § 1925, is one of the crimes enumerated in Title III. If the Government would consent to the vacating of the present order, it could obtain all the information, including the lease lines and technical assistance it desires. Courts in several jurisdictions have affirmed the right of the Government to obtain a pen register when used in conjunction with a wiretap order (Title III). In a good faith effort to resolve this matter expeditiously and without prejudice to either the rights of the FBI, Telephone and/or the public, it is suggested to the Court that the Government proceed

by Title III. There appears little reason for the Government to obtain the full wiretap capabilities simply by attempting to obtain a pen register in a non-Title III application. Under a non-Title III application, the Government can circumvent all of the safeguards and requirements of Title III and yet obtain the full capability of wiretapping. Such a procedure certainly is not within the true spirit of the law. Congress intended to protect the Government, Telephone and the public in general by the enactment of Title III. When the Government can utilize Title III, it should be required to do so and not look to cut corners.

12. The issues being presented to this Court are currently pending in a lawsuit before the Court of Appeals, 5th Circuit, Southern Bell v. United States. Oral argument was had before that Court on February 10, 1976, and it is anticipated that a decision will be forthcoming in the very near future. In view of the above, the present order raises very substantial legal questions as to the power of this Court to issue said order. I believe it has been demonstrated that in issuing the order of

March 19, 1976, the Court lacked lawful authority to compel Telephone to provide all information, facilities and technical assistance for a pen register and said order should be vacated.

for N. No previous application has been made.

Sworn to before me this
30th day of March, 1976.

Frank R. Natoli
Frank R. Natoli

Richard H. Bynum

RICHARD H. BYNUM
Notary Public, State of New York
No. 03-0526610
Qualified in Bronx County
Commission Expires March 30, 1977

*for N. Order to show cause is necessary since the
Order has a time limitation of 20 days from
March 19, 1976.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

APPLICATION OF THE UNITED STATES
OF AMERICA IN THE MATTER OF AN
ORDER AUTHORIZING THE USE OF A
PEN REGISTER OR SIMILAR MECHANICAL
DEVICE.

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

WILLIAM F. McGARTY, being duly sworn, deposes and says:

1. I am employed by the New York Telephone Company (hereinafter referred to as "Telephone") as Security Supervisor. I have served in various capacities for Telephone in the Plant Department, which installs and repairs communication facilities of Telephone. I have been in the Security Division approximately 8-1/2 years where I served as an Investigator for about two years prior to my promotion to Security Supervisor.

2. In my capacity as Security Supervisor, I am primarily responsible for liaison with all law enforcement authorities - local, state and federal. Based upon my experience, I am thoroughly familiar with the functions and use of a device known as a pen register.

3. A pen register is a mechanical device which is physically connected to the telephone line of a subscriber. It records on paper tape all the numbers dialed from the telephone instrument to which it is connected. It will record all such numbers whether or not the call is answered. The electrical impulses emanating from the use of the dial to which a pen register is attached record markings on paper tape which can be translated into the number dialed.

4. In order to install a pen register, it is only necessary to identify the "pair" (twin wires composing the circuit of a telephone line) and the "cable" in which the pair is located at which access to the subscriber's line may be obtained. In addition, it is necessary to identify the location of "appearances" for such telephone line which are located outside of a subscriber's premises and Telephone's central office. An "appearance", of which there may be several, may be located in the basement of an apartment house, a telephone pole, a rear wall of a building, etc. A pen register may be attached at any of these "appearance" locations.

5. "Leased lines" which are sought in this proceeding are telephone pairs which are made available from one terminal or "appearance" location to another terminal or "appearance" location at a remote place, which remote place can be selected by any person properly ordering leased line facilities. The remote place may be an office, store front, basement, etc., and the leased lines will, of course, transmit any dial pulses or conversation between the two locations as above described.

6. The location of the "appearance", together with the pair and cable information, may be used to eavesdrop and/or install a listening and recording device in such remote places and, with leased lines, eavesdropping and recording may be done at a remote place. It is noted that once a pen register has been installed, a full wiretap "interception" of telephone conversation may be accomplished simply by attaching headphones or a tape recorder to the appropriate terminal on the pen register unit.

7. On March 24, 1976, a copy of an order of this Court, dated March 19, 1976, entered in the above entitled

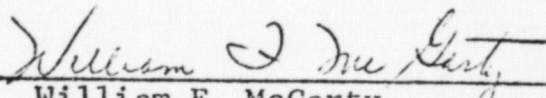
proceeding was presented to Telephone by Walter F. Smith, Special Agent of the Federal Bureau of Investigation, United States Department of Justice. This order authorized special agents of the Federal Bureau of Investigation to install a pen register on particular telephone numbers in New York City, New York, an area which is serviced by Telephone. Under my supervision Telephone provided the appearance information and/or terminal locations as requested by the agent. We are further willing to provide information concerning the necessary pair, cable and appearance information. This is more fully described in paragraph "6" above. The information which we are willing to furnish is sufficient for the installation of a pen register device and/or the installation of eavesdropping devices. The Federal Bureau of Investigation with the information we are willing to furnish will have the full capacity to install a pen register without any further assistance of Telephone. However, we are not willing to provide facilities (lease lines) as required by said order.

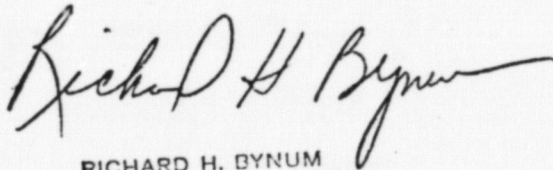
8. The order which was served on March 24, 1976, directed Telephone to furnish "all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the service

that such carrier is according the person whose communications are being intercepted, the furnishing of such facilities or technical assistance by the New York Telephone Company to be compensated for by the applicant at the prevailing rates." Clearly, the reading of said order is directing Telephone to provide lease lines which I, after consultation with the Legal Department of Telephone, refused to provide in any manner other than that which I have previously indicated, as described in paragraph '7" above. The order is affirmatively directing Telephone to physically set up the facilities (lease lines) and technical assistance which, I am advised by Telephone counsel, is improper and not under lawful authority.

Sworn to before me this

30th day of March, 1976


William F. McGarty



RICHARD H. DYLUM
Notary Public, State of New York
No 03-0526610
Qualified in Bronx County
Commission Expires March 30, 1977

APPLICATION OF THE UNITED STATES

20

OF AMERICA IN THE MATTER OF AN

Misc. No.

ORDER AUTHORIZING THE USE OF A

19-97(44)

PEN REGISTER OR SIMILAR MECHANICAL

DEVICE

ORDER

AUTHORIZING USE OF A PEN REGISTER

TO: Special Agents of the Federal Bureau of Investigation,
United States Department of Justice

Affidavit having been made before me by Walter F. Smith, Special Agent of the Federal Bureau of Investigation, United States Department of Justice, and full consideration having been given to the matters set forth therein the court finds:

(a) there is probable cause for belief that

_____ and others

as yet unknown have committed, are committing, and will continue to commit offenses listed in Section 2516 of Title 18, United States Code, involving the use of facilities in interstate commerce in order to promote, manage, establish and carry on an unlawful activity, to wit: a gambling enterprise in violation of Section 1952 of Title 18, United States Code, and are conspiring to commit such an offense in violation of Section 371 of Title 18, United States Code;

(b) there is probable cause to believe that the telephones subscribed to by _____ and located at

_____, New York, New York, and bearing

telephone numbers

21

have been, are being, and will continue to be used

Unknown), and others as yet unknown in commission of the above described offenses.

WHEREFORE, it is hereby ordered that the New York Telephone Company, a communication carrier as defined in Section 2510 (10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the service that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the New York Telephone Company to be compensated for by the applicant at the prevailing rates.

WHEREFORE, it is further ordered that Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized to:

(a) install mechanical devices on the telephones subscribed to by _____ and located at 220 East 14th Street, New York, New York, and bearing telephone numbers _____ and _____ which telephones have been, are being, and will continue to be used at said address.

(b) operate such mechanical device until the telephone numbers of all outgoing calls dialed lead to the identities of the associates and confederates of _____

and their places of operation,
or for a period of twenty (20) days from the date
of this Order, whichever is earlier.

Provided that the operation of this device must
terminate upon attainment of the authorized objective, or in
any event, at the end of twenty (20) days from the date of
this Order.

Dated: *March 19, 1976*

S/c Charles H. Terrence
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

IN RE: :

APPLICATION OF THE UNITED : AFFIDAVIT
STATES OF AMERICA IN THE MATTER :
OF AN ORDER AUTHORIZING THE USE : Misc. No. 19-97(44)
OF A PEN REGISTER OR SIMILAR : (C. H. T.)
MECHANICAL DEVICE. :

----- x

STATE OF NEW YORK :
COUNTY OF NEW YORK : ss. :
SOUTHERN DISTRICT OF NEW YORK)

1. I am a Special Attorney of the United States

Department of Justice, assigned to the New York Joint Strike Force
Against Organized Crime and Racketeering for the Southern
District of New York, and am in charge of the prosecution of this
matter.

2. I make this affidavit in opposition to a motion by

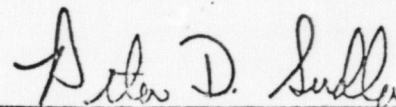
the New York Telephone Company to vacate that portion of this
Court's Order of March 19, 1976 directing the Telephone Company
to furnish facilities and technical assistance (including lease lines)
in order to effectuate the installation of a pen register.

3. I have been informed by Special Agent Walter F.

Smith of the FBI that the Telephone Company has refused to
provide lease lines, which refusal has prevented this investigation
from proceeding. The Telephone Company has advised that the
FBI should string cables from the subject apartment to another
location when a pen register device can be installed.

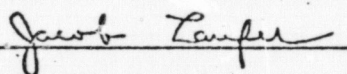
4. After conferring with Special Agent Smith, it has been concluded that such an operation is unfeasible, and would expose the Government's investigation of the illegal gambling operation. Agent Smith, after conducting surveillances, has advised that if men were observed stringing lines and cables from the subject apartment to another location, the gambling operation would cease to function.

5. Accordingly, based on this affidavit, the affidavit of Special Agent Smith, and the memorandum of law submitted herewith, the motion of the New York Telephone Company to vacate the Court's Order of March 19, 1976 should be denied.



PETER D. SUDLER
Special Attorney
United States Department of Justice

Subscribed and sworn to before me
this 31st day of MARCH, 1976



JACOB LAUFER
Notary Public, State of New York
No. 24-4609171
Qualified in Kings County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
IN RE APPLICATION OF THE UNITED :
STATES OF AMERICA IN THE MATTER OF AN :
ORDER AUTHORIZING THE USE OF A PEN :
REGISTER OR SIMILAR MECHANICAL :
DEVICE. :

AFFIDAVIT
Misc. No. 19-97 (44)
(CHT)

----- x
State of New York }
County of New York } ss.:
Southern District of New York }

Walter F. Smith, being duly sworn, deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation, assigned to the New York City Office, and am in charge of the investigation which is the subject matter of this motion. As such I am familiar with the facts alleged herein.

2. The Federal Bureau of Investigation is presently conducting an investigation into organized criminal activity focusing upon the operation of an illegal gambling business functioning within the Borough of Manhattan. This gambling syndicate operates through the use of a wire room located in an apartment wherein telephone lines are connected. The location of this apartment and the telephone numbers connected thereto are changed on approximately a bi-monthly basis.

3. On March 19, 1976 an order authorizing the use of a pen register or similar mechanical device was signed by the Honorable Charles H. Tenney, United States District Judge. That order directed the New York Telephone Company to furnish forthwith "all information, facilities and technical assistance" necessary to comply with the Court's order.

4. On March 19, 1976 at approximately 2:00 p.m., the affiant proceeded directly from the chambers of Judge Charles H. Tenney to the offices of the New York Telephone Company and attempted to deliver a conformed copy of the aforementioned order to Leonard Dudden, an employee of the Security Department of the New York Telephone Company, and serving as liason officer with the Federal Bureau of Investigation in matters requiring the cooperation or assistance of the telephone company. The affiant was

informed by the lobby receptionist at the telephone company offices, 1095 Avenue of the Americas, New York, New York, that Leonard Dudden had left the premises and was not available.

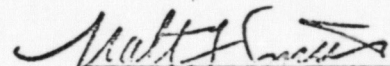
5. On March 22, 1976, the affiant was informed by John E. Craig, a Special Agent of the FBI that Special Agent Craig had contacted Leonard Dudden on March 19, 1976 in regard to the leasing of telephone lines in order to suitably install pen registers on telephone instruments in an apartment located on 14th Street in the borough of Manhattan. Special Agent Craig advised the affiant that Leonard Dudden had refused the FBI's request to lease telephone lines on March 19, 1976.

6. From March 20, 1976 up to and including March 23, 1976, the affiant and other Special Agents of the FBI, assigned to this gambling investigation, canvassed the area of 14th Street, New York, New York, in the vicinity of the aforementioned subject apartment, in an attempt to locate a suitable location from which the monitoring of pen registers could be conducted without compromising the investigation. Inasmuch as the buildings immediately adjacent to the apartment building in which the gambling operation is located are abandoned and all windows and doors are sealed with sheet metal, and the fact that prior investigation and interception of wire communication of the operators of this gambling operation discloses that these operators employ countersurveillance techniques thereby precluding the installation of a pen register device or actual lines leading to a pen register device in another location.

7. On March 24, 1976, the affiant delivered a conformed copy of the aforementioned order to Leonard Dudden at 1095 Avenue of the Americas, New York, New York, the offices of the New York Telephone Company. Prior to examining the order, Dudden stated that the leasing of telephone lines in non-title three matters was prohibited by Telephone Company regulations and Dudden therefore

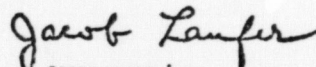
refused to comply with the order. In the presence of the affiant, Dudden gave the aforementioned copy of the order to John Whitman, the Security Manager of New York City-East for the New York Telephone Company. Whitman examined the conformed copy of the aforementioned order and stated that, in accordance with New York Telephone Company policy, he would refuse to comply with the order and therefore would not lease telephone lines to the FBI for this investigation. The affiant requested that this court order be brought to the attention of the legal department of the New York Telephone Company and Whitman stated that the order would be provided to the legal department but that it was also in accordance with instructions from the legal department, and that Whitman was refusing to comply with the order.

WHEREFORE, the affiant respectfully requests that the motion of the New York Telephone Company, seeking to vacate that portion of the Court's order of March 19, 1976 directing the telephone company to provide lease lines, be denied.



WALTER F. SMITH
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to
before me this 31st day
of March, 1976.



JACOB LAUFER
Notary Public, State of New York
No. 24-4609171
Qualified in Kings County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
IN RE:

APPLICATION OF THE UNITED STATES
OF AMERICA IN THE MATTER OF AN
ORDER AUTHORIZING THE USE OF A
PEN REGISTER OR SIMILAR MECHANICAL
DEVICE.
-----X

:
: MISC. No. 19-97(44)
: (C.H.T.)

GOVERNMENT'S MEMORANDUM OF LAW

The government submits this memorandum of law in opposition to the motion of the New York Telephone Company to vacate that part of this Court's order of March 19, 1975, directing the telephone company to furnish Special Agents of the Federal Bureau of Investigation with all information, facilities (including lease lines) and technical assistance necessary to effectively utilize a pen register.

ARGUMENT

I THIS COURT'S ORDER OF MARCH 19, 1976
AUTHORIZING USE OF A PEN REGISTER WAS
A PROPER ORDER

A. The Nature of Pen Register Surveillance

The pen register is a device for discovering the number of other telephone installations dialed from the instrument to which it is attached. 1/ it has been used by telephone company personnel to check the integrity of their billing procedures and for other business purposes. Pen registers have also been used by law enforcement agencies in the course of their duties. The aim of the pen register is to learn the numbers called from the subject telephone, not to learn the contents of that call or, indeed, even to learn if the call was completed. The information obtained by a pen register may in some cases, be obtained by subpoena. This situation obtains where Message Unit Detail service is available to the telephone company. Simply stated, Message Unit Detail is a written record of the telephone calls placed from a telephone installation, including the number called, the date, and the

1/ An excellent discussion of the technical aspects of pen registers and similar devices may be found in United States v. Focarile, 340 F.2d 1033, at 1038-40 (E.D.Md. 1972) aff'd sub nom. United States v. Giordano, 469 F.2d 522 (3d Cir. 1972) aff'd 416 U.S. 505 (1974).

time of the call. The chief difference between Message Unit Detail and the results of a pen register surveillance is that the pen register provides a record at the time of the call, while Message Unit Detail is not available until the end of the period to which it relates. Message Unit Detail is not available in all parts of the Bell Telephone Company System, and specifically is not available for the telephone number which is the subject of the order in this case.

B. Pen Register Surveillance, While a Form of Electronic Surveillance, is not Controlled by Title 18, United States Code, §§ 2510-2520.

The Legislative History of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. 90-351, which added §§ 2510-2520 to Title 18 of the United States Code, makes it quite clear that a pen register is not included among the devices which "intercept" a communication. The aim of that title was to enact a comprehensive statutory framework within which legitimate electronic surveillance in the form of "interceptions," or wiretapping, could occur. No "interceptions" that were not conducted in accordance

with the detailed procedures set forth in Title III were to be permitted. Sanctions for illegal wiretaps were created and set out. In short, Title III deals exclusively with the interception of wire or oral communications, in all of its aspects, and does not reach the use of devices, such as a pen register, which do not "intercept" communications.

In the years preceding the enactment of Title III the interception and disclosure of communications was controlled by the provisions of the Federal Communications Act, particularly Section 605 (47 U.S.C. 605). That section, prior to its amendment by Title III, provided in pertinent part:

... and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; June 19, 1934, c.652, Title VI, Section 605, 48 Stat. 1103 (emphasis supplied)

In 1968 Title III amended that statute, making the quoted language applicable only to radio communications and leaving the control of the interception of wire communications wholly to Title III.

In the years prior to the amendment of Section 605 and the enactment of Title III there was authority for the position that the use of a pen register did involve interception of wire communications and did disclose the existence of such communications, in violation of 47 U.S.C. 605. See, e.g. United States v. Dote, 371 F.2d 176 (7th Cir. 1966), United States v. Guglielmo, 245 F.Supp. 534 (N.D.Ill. 1965), United States v. Caplan, 255 F.Supp. 805 (E.D.Mich. 1966), Huff v. Michigan Bell Telephone Company, 278 F.Supp. 76 (E.D.Mich. 1967). Each of these cases depended upon the applicability of the quoted language of the original Section 605 to wire communications. In each case a pen register was used to intercept wire communications and the results of that surveillance disclosed, in violation of Section 605. The essential basis of each descision has been removed by the amendment of that section.

Further, the intent of congress in drafting the new federal electronic surveillance statute is crystal clear. The statutory schem: states that:

- (1) Except as otherwise specifically provided in this chapter any person who --
 (a) willfully intercepts, endeavors to intercept or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

* * *

shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. 2511, Added Pub.L. 90-351, Title III, Section 802, June 19, 1968, 82 Stat. 213, and amended Pub.L. 91-358, Title II, Section 211(a), July 29, 1970, 84 Stat. 654. Inasmuch as the proscriptions of Title III are aimed at interceptions of wire (and oral) communications, the definition of "intercept" determines whether pen registers intercept communications. 18 U.S.C. 2510 contains the definitions used in the statute, and states that "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." A pen register acquires its information, including "contents" (defined as "any information concerning . . . the existence . . . of that communication) by interpreting and printing out electric pulses, and not aurally. 18 U.S.C. 2510(4) and (8).

The clearest statement of the non-applicability of Title III occurs in the Legislative History accompanying the statute's enactment.

The proposal legislation is not designed to prevent the tracing of phone calls. The use of a "pen register," for example would be permissible. But see United States v. Dote, 371 F.2d 176 (7th 1966).

U.S. Code Cong. and Admin. News, 90th Cong., 2d Sess., (1968) Vol. 2, p. 2178. See also United States v. Illinois Bell Telephone Company, Slip Op. No. 75-1909 (7th Cir. February 23, 1976).

C. The Permissibility of the Use of a Pen Register by Law Enforcement Officers Depends Entirely Upon Fourth Amendment Considerations

Because it does not involve an interception of wire (or oral) communications, the use of a pen register by law enforcement officials is controlled by considerations outside of Title III. Those considerations were summed up by Mr. Justice Powell in his concurring and dissenting opinion in United States v. Giordano:

The installation of a pen register device to monitor and record the numbers dialed from a particular telephone line is not governed by Title III . . . (citations omitted). Any doubt of the correctness of this interpretation is allayed by reference to the legislative history of Title III....

Because a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment. (footnote omitted). In this case the Government secured a Court order, the equivalent for this purpose of a search warrant, for each of the two extensions of its authorization to use a pen register.

United States v. Giordano, 416 U.S. 505, 553-54, (Powell, J. concurring and dissenting). Mr. Justice Powell's dissent was permitted upon his disagreement with the majority's conclusion that an improperly authorized wiretap tainted the probable cause support for all that came after it. Even if his conclusion is rejected, his view that only the requirements of the Fourth Amendment condition the use of pen registers by law enforcement officers is unimpaired. This conclusion finds support in the decision of Judge Miller, who in deciding United States v. Focarile, rejected the motion to suppress the fruit of the first pen register, observing that it was supported by untainted probable cause. United States v. Focarile,

340 F.Supp. 1033, 1041 (D.Md. 1972) aff'd sub nom. United States v. Giordano, 469 F.2d 522 (3d Cir. 1972), aff'd 416 U.S. 505 (1974).

The most recent decisions involving pen register usage by law enforcement officials in the Seventh Circuit are United States v. Finn, 502 F.2d 938 (7th Cir. 1975) and United States v. Illinois Bell Telephone Co., supra. In Finn the Court of Appeals, reversed the decision of the district court suppressing pen register evidence on the authority of Dote, supra. The pen register in that case had been authorized by a district court judge upon affidavits reciting probable cause. The Court observed that Dote's vitality had been entirely eroded by the amendment of Section 605 of the Communications Act and went on to demonstrate that notwithstanding the confusing grammatical arrangement of amended Section 605, the clear intent of numbered clauses (2)-(6) was to provide exceptions to the general rule of non-disclosure. The Court concluded by announcing that

" (a) search warrant supported by probable cause is a 'demand of other lawful authority' within exception (6)."

In Finn, supra, as in Focarile, supra, the order was characterized as a search warrant supported by probable cause. The requirement of probable cause, and not the form of words used, is the essence of the "constitutional requirements of the Fourth Amendment" which was insisted upon by Mr. Justice Powell in Giordano. The element of probable cause was supplied to the Court in this case in the affidavit of Special Agent Smith and is not contested on this motion

II THE DISTRICT COURT HAS BOTH STATUTORY
AND INHERENT POWER TO ORDER THE TELEPHONE
COMPANY TO FURNISH ASSISTANCE REQUIRED
TO IMPLEMENT ITS ORDER OF MARCH 19, 1976

A. The All Writs Act, Title 28, United States Code, Section 1651 Supplies Statutory and Inherent Authority for the Court's Order to the Telephone Company

In the circumstances of this case, refusal of the company to provide the technical facilities including lease lines, pursuant to the terms of this Court's order of March 19, 1976, would defeat the entire order by rendering it incapable of effective implementation. The order authorizing the employment of a pen register is a proper exercise of the jurisdiction of the Court, resting as it does on the common law and the

fair implications of Rule 41, Fed. Rules of Criminal Procedure. United States v. Focarile, supra at 1041, United States v. Giordano, supra, at 554. The Telephone Company is uniquely situated to frustrate that exercise of jurisdiction by refusing to make available the facilities and information which it alone possesses, as a consequence of its monopoly position as the only communications common carrier permitted to provide telephone service to the subscriber. To allow such a situation to remain is tantamount to delivering to the telephone company the exclusive authority to decide when and under what circumstances, if any, pen registers may be used by law enforcement agents.

The Court is not without power to defend a proper exercise of its jurisdiction. Title 28, United States Code, Section 1651, the All Writs Act, provides, in pertinent part:

(a) The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

As noted above, this Court had jurisdiction to enter its order authorizing government law enforcement agents to employ a pen register. The point has not been disputed by the telephone company. The resulting issue then may be stated thusly: What writ may the court issue which can be found to be necessary or appropriate in aid of its jurisdiction?

Courts, in construing the All Writs Act, 28 U.S.C. Section 1651, have expressed this aspect of the nature of Courts and the judicial process in various ways. The United States Court of Appeals for the Tenth Circuit stated it in these words:

The federal courts have power to issue such writs and orders as are necessary to protect their jurisdiction. Title 28, U.S.C. Section 1651 of the United States reads as follows:

'(a) The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.'

In re Quick Charge, Inc., 69 F.Supp. 961, 969 (D.Okl. 1947), reversed on other grounds, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 886 v. Quick Charge, Inc., 168 F.2d 513 (10th Cir. 1948), the Court said:

'It is (a fundamental principle) that a Court of equity has the inherent power to issue such orders and injunctions that may be necessary to prevent defeat or impairment of its jurisdiction. If these fundamental principles were not so inherent in the Court, such a Court would indeed be a feeble arm of government and for all practical purposes would be a nullity.'

United States v. Moore, 427 F.2d 1020, 1023 (10th Cir. 1970) (Emphasis supplied.) The Court of Appeals for the Seventh Circuit, in the Illinois Bell decision, supra, has likewise held that the District Court has both inherent power and statutory power pursuant to the All Writs Act to defend a proper exercise of its jurisdiction. Illinois Bell, supra, at 7-8.

Clearly then, far from having neither statutory nor inherent powers to compel the Telephone Company to render the assistance sought; the Court has both statutory and inherent

powers to do so, if the order may fairly be characterized as being "necessary or appropriate in aid of its . . . jurisdiction and agreeable to the usages and principles of law."

B. Congress has Explicitly Recognized the Need for the Assistance of Communications Common Carriers in Electronic Surveillance of Wire Communications

The Telephone Company in the affidavit of Frank R. Natoli argues that the body of the Court's order is worded so that "it directs Telephone Co. to furnish the Federal Bureau of Investigation with the capability to perform an interception." Natoli affidavit page 3. Mr. Natoli goes on to argue that the Court's order directs the interception of communications and this must be obtained pursuant to the provisions of Title III. That being the case, it follows that the same information, facilities and technical assistance are required for a pen register installation as would be required for a wiretap. Congress, in enacting the amendments to Title III which provide for compelling the assistance of communications common-carriers in wiretap installations, was reacting directly to the decision of the Court of Appeals for the Ninth Circuit

in Application of United States, 427 F.2d 639 (9th Cir. 1970).

In that case the Court held that a telephone company could not be required to furnish information, facilities and technical assistance to government agents in connection with a Court-approved Title III wiretap. The basis for the decision was not that the assistance was not needed; it was that no provision had been written into the comprehensive wiretap law expressly allowing a judge to require such assistance. Accordingly, Congress adopted amendments which permit a Court to require such assistance from communications common carriers. 18 U.S.C. 2511(a) was amended to remove such cooperation from the ambit of the criminal sanctions provision and 18 U.S.C. 2520 was amended to broaden the "good faith reliance on a Court order" defense to both criminal and civil liability. July 29, 1970, Pub.L. 91-358, Title II, Section 211, 84 Stat. 654. The motivating intent is clear, the effectiveness of the wiretap tool to law enforcement agents would be lost if the assistance of the Telephone Company, properly compensated and protected from criminal or civil liability, could not be required.

C. The Telephone Company Advances No Congent Reason Why It Should Not Comply With This Court's Order

The position of the Telephone Company is that there is no statutory or inherent power in the district court to require it to render assistance in placing pen registers. The Telephone Company also expresses fear of civil or criminal liability which would or could result in harm to it from obedience to the Court's order. 1/

Assuming that the Telephone Company has real fears of criminal or civil liability which might result from its cooperation, the government contends that they are not well-founded and so do not constitute reasonable grounds for refusing to comply with the order.

1. Criminal Liability

The suggested basis for possible criminal liability is Section 605 of the Communications Act, which prohibits, with certain exceptions, disclosing the existence, contents, etc. of wire communications, unless the permission of the addressee or his agent or attorney is obtained. Among those

1/ Natoli affidavit, p.6.

exceptions is "... (6) on demand of other lawful authority."

The Seventh Circuit in the Illinois Bell decision, as well as the Court, in United States v. Finn, supra, have both concluded that "a search warrant supported by probable cause is a 'demand of other lawful authority' within exception (6)." Finn at 943, Illinois Bell at 8. The order of March 19, 1976, while not in the form a search warrant, is an order "in the nature of a ... search warrant" and is supported by probable cause, and is likewise within exception (6). There is no basis for criminal liability on the part of the Telephone Company.

2. Civil Liability

The Telephone Company may argue as a possible bases for civil liability the Civil Rights Act, 42 U.S.C. 1983. The government's view is that the order of the district court could be interposed as a defense to any civil damage suit which might be brought under that statute. Congress expressly made such good faith reliance a defense to both

criminal and civil suits under the terms of Title III. Recognizing that Title III and its defense provisions are not applicable to a pen register situation, the government nevertheless contends that the logic is persuasive. The author of the law which eventually was enacted as Title III, G. Robert Blakey, composed a draft model law for electronic surveillance and included a section remarkably similar to that which was finally enacted as 18 U.S.C. 2520. This provision, dealing with the "good faith reliance" defense contains the following observation:

This provision makes explicit what would probably be followed in practice. See, e.g., Pierson v. Ray, 386 U.S. 547, 555 (1967)

Blakey and Hancock, Electronic Surveillance Control Act, 43 Notre Dame Lawyer 657 (1968).

The foregoing assumes, of course, that a civil damages suit would survive a threshold motion to dismiss. To the extent that any such suit rested upon a claimed invasion of privacy, the answer would be that there has been

none, where only the identity of the called party was discovered. This information is routinely collected where Message Unit Detail is accumulated and vulnerable to subpoena. Further, in response to a claim of an invasion of privacy by use of a pen register, Judge Nielsen said:

Conversations searched and seized from defendants not individually specified in the surveillance authorization order are held to be admissible against them under Title III. It follows from this that the seizure of the identity of these unspecified individuals is likewise proper under the Fourth Amendment. Seizing one's identity can be no greater an intrusion on individual privacy than seizing one's conversation.

United States v. King, 335 F.Supp. 523, 549 (S.D.Cal.1971)
rev'd on other grounds, 473 F.2d 494 (9th Cir. 1973).

In short, the Telephone Company does not stand in realistic danger of either criminal or civil liability if it complies with the order of September 18, 1975.

CONCLUSION

The motion to vacate should be denied.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York

PETER D. SUDLER
Special Attorney
U.S. Department of Justice

Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

IN RE
APPLICATION OF THE UNITED STATES OF
AMERICA IN THE MATTER OF AN ORDER
AUTHORIZING THE USE OF A PEN REGISTER
OR SIMILAR MECHANICAL DEVICE.

MOTION TO STAY

Misc. No. 19-97(44)
(C.H.T.)

-----X

NEW YORK TELEPHONE COMPANY ("Telephone") moves this Court to stay the order of this Court issued on March 19, 1976, which directed Telephone to furnish information, facilities and technical assistance to law enforcement officials pending its appeal from an order of the Court, dated April 2nd 1976, denying Telephone's Motion to Vacate or Modify said Order.

As grounds therefor Telephone respectfully represents that said Motion to Vacate or Modify the Order directing Telephone's assistance was filed in good faith and was supported by a Memorandum of Law containing arguments and citing authorities which were meritorious and presented questions of law which are presently under consideration by the United States Court of Appeals, Fifth Circuit, in a case styled Southern Bell v. United States. In that case, oral argument was held before that Court on February 10, 1976, and it is anticipated that a decision will be forthcoming in the very near future.

procedure by the Government without ever having the issues raised herein decided.

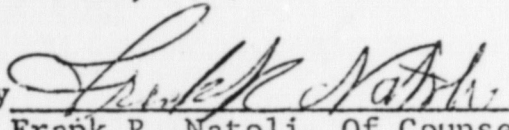
Telephone's motion to vacate the March 19, 1976 Order is grounded in a deep concern that such Order results in an invasion of the expectation that citizens have that their use of the telephone will not be disclosed except in the limited circumstances authorized by the Congress. That there is a legitimate question that the Order sought to be vacated goes beyond the intent of Congress is evident from the different results reached by the courts which had considered the matter to date. Should a stay not be granted pending review by the Court of Appeals, the rights of the individuals involved will have been irrevocably invaded. Their rights can only be protected and the intent of congress preserved by a stay pendente lite.

Telephone will cooperate with the United States to obtain expeditious consideration of the appeal.

In the alternative Telephone respectfully moves the Court to stay for such time as may be necessary in order for it to apply for a stay to the United States Court of Appeals, for the Second Circuit. The Clerk's office of the Court of

Appeals for the Second Circuit advised Telephone that the next date for a hearing of a Motion to Stay is Tuesday, April 6, 1976. Telephone requests a stay until such time as the motion is heard and decided.

GEORGE E. ASHLEY
Attorney for
NEW YORK TELEPHONE COMPANY
1095 Avenue of the Americas
New York, N.Y.

By 
Frank R. Natoli, Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion to Stay was served by delivering a copy by ~~mail~~ to the office of WILLIAM I. ARONWALD, Esq., Attorney in Charge, United States Department of Justice, Joint Strike Force Against Organized Crime and Racketeers for the Southern District of New York, St. Andrew's Plaza, New York, New York.

GEORGE E. ASHLEY
Attorney for
New York Telephone Company

By Frank R. Natoli
Frank R. Natoli, Of Counsel

Sir:- Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

19

on the day of at N.Y.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPLICATION OF THE UNITED
STATES OF AMERICA IN THE
MATTER OF AN ORDER
AUTHORIZING THE USE OF A
XIN REGISTER OR SIMILAR
MECHANICAL DEVICE

NOTION TO STAY

GEORGE F. ASHLEY

Attorney for New York Telephone Company

Office and Post Office Address, Telephone

1095 Avenue of the Americas
New York, N.Y. 10036

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

*Motion denied
It is so ordered
Morris E. Lasker
U.S.D.J.
4/6/76*

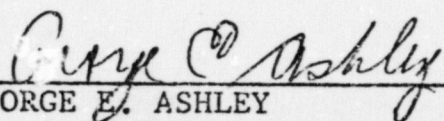
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In Re APPLICATION OF THE UNITED STATES
OF AMERICA IN THE MATTER OF AN ORDER
AUTHORIZING THE USE OF A PEN REGISTER
OR SIMILAR MECHANICAL DEVICE.
-----X

NOTICE OF APPEAL

Misc. No. 19-97(44)
(C.H.T.)

Notice is hereby given that New York Telephone Company ("Telephone"), as a party affected by the cause, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order in this action dated April 2, and filed April 5, 1976, denying Telephone's motion to vacate or modify the Court's order of March 19, 1976, compelling Telephone to furnish information, facilities and technical assistance to law enforcement officials in connection with the mechanical device known as a pen register. This appeal is taken from each and every part of said Order as well as the whole thereof.



GEORGE E. ASHLEY
Attorney for
New York Telephone Company
1095 Avenue of the Americas
New York, N.Y. 10036

CERTIFICATE OF SERVICE

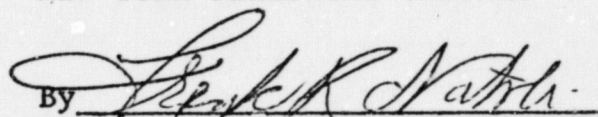
and

SERVICE LIST

I HEREBY CERTIFY that a true copy of the foregoing
Notice of Appeal was served by delivering a copy by hand to the
office of

WILLIAM I. ARONWALD, Esq.
Attorney in Charge
United States Department of Justice
Joint Strike Force Against Organized
Crime and Racketeers for the Southern
District of New York
St. Andrew's Plaza
New York, New York

GEORGE E. ASHLEY
Attorney for
NEW YORK TELEPHONE COMPANY

By 
Frank R. Natoli, Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

In Re APPLICATION OF THE UNITED STATES
OF AMERICA IN THE MATTER OF AN ORDER
AUTHORIZING THE USE OF A PEN REGISTER
OR SIMILAR MECHANICAL DEVICE.

MOTION TO STAY

-----X

NEW YORK TELEPHONE COMPANY ("Telephone") moves this Court for a stay of the Order which directed Telephone to furnish information, facilities and technical assistance to law enforcement officials issued by the United States District Court (SDNY) on March 19, 1976, Tenney, J., pending its appeal to this Court from the Order of Judge Tenney, dated April 2nd, 1976, denying Telephone's Motion to Vacate or Modify the March 19, 1976 Order. *filed April 5*

As grounds therefor Telephone respectfully represents that:

1. On March 19, 1976, an Order was issued by the United States District Court (SDNY), Tenney, J., directing Telephone to furnish information, facilities and technical assistance to law enforcement officials in connection with the installation and operation of a mechanical devise known as a pen register. A copy of this Order is appended hereto as Exhibit "A".

2. On March 24, 1976, Telephone was served with said Order by a Special Agent of the Federal Bureau of Investigation ("FBI"). Upon receipt of said Order Telephone's Security Office provided the Government Agents with appearance information, but refused to furnish lease lines since Telephone questioned the legal authority of the District Court to order Telephone to provide lease lines and technical assistance in a criminal investigation.

3. On March 25, 1976, Telephone's Legal Department contacted the office of WILLIAM I. ARONWALD, Esq., Attorney in Charge of the Joint Strike Force Against Organized Crime and Racketeers of the United States Department of Justice and advised the Government that Telephone intended to move to vacate or modify the March 19, 1976 Order. On the following day, March 26, 1976, Telephone's counsel was again in contact with the Government's counsel. By mutual agreement with the Government, Telephone agreed to have its motion papers ready by the early part of the following week. On Monday, March 29, 1976, counsel for Telephone and the Government again had a discussion covering the forthcoming motion. On this date Telephone advised the Government that the Order to Show Cause would be presented on the following day.

4. On March 30, 1976, Telephone promptly filed a motion brought on by Order to Show Cause seeking to vacate or modify the March 19, 1976 Order. Both parties submitted affidavits and memoranda of law on March 31, 1976. Telephone's supporting affidavits and memorandum of law are appended hereto and marked Exhibits "B" and "C". On April 5, 1976, Judge Tenney denied, in all respects, Telephone's motion to vacate or modify the Order. Hereto attached is a copy of that decision marked Exhibit "D".

5. At the time of filing the Order to Show Cause, application was made therein for a Stay pending Judge Tenney's decision. The Stay application was denied on March 30, 1976.

6. In view of the decision denying Telephone's motion, application is herein made to this Court for a Stay pending the appeal. Application to the District Court (Judge Tenney) for a Stay is not practicable since Judge Tenney is on vacation and will remain away the entire week. Further, in view of his previous denial for a Stay, it appears unlikely that one would be granted by the District Court. However, time is of the essence in this particular proceeding. It must be further noted that at the time of filing the Order to Show Cause, the Government opposed any Stay pending the decision. Accordingly, Telephone has no alternative but to make its application directly to the Second Circuit for a Stay pending its appeal. In the absence of J. Tenney, formal application for a stay was made to J. Looker and said stay was denied. On April 3 - 6, 1976, the Government also refused to consent to the stay.

7. Telephone respectfully represents to this Court that said Motion to Vacate or Modify the Order directing Telephone's assistance was filed in good faith and was supported by a Memorandum of Law containing arguments and citing authorities which were meritorious and presented questions of law which are presently under consideration by the United States Court of Appeals, Fifth Circuit, in a case styled Southern Bell v. United States. In that case, oral argument was held before that Court on February 10, 1976, and it is anticipated that a decision will be forthcoming in the very near future.

8. Telephone's motion to vacate the March 19, 1976 Order is grounded in a deep concern that such Order results in an invasion of the expectation that citizens have that their use of the telephone will not be disclosed except in the limited circumstances authorized by the Congress. That there is a legitimate question that the Order sought to be vacated goes beyond the intent of Congress is evident from the different results reached by the courts which have considered the matter to date. Should a stay not be granted pending review by the Court of Appeals, the rights of the individuals involved will have been irrevocably invaded. Their rights can only be protected and the intent of Congress preserved by a stay pendente lite.

9. It is important to note that should this motion to stay not be granted, Telephone and its employees face the real dilemma of choosing between civil and criminal liability. If the order directing Telephone's assistance is lawful, interference with its execution by Telephone or any of its employees might be considered contempt of court or a possible violation of 18 U.S.C. §§1509, 1510 concerning obstruction of justice. On the other hand, compliance with an invalid order will violate the privacy of telecommunications and subject Telephone and its employees to substantial civil liability under 18 U.S.C. §2520 and 47 U.S.C. §605. It is, therefore, important that the validity of the Court's order be determined by the Court of Appeals before Telephone is required to furnish such assistance.


10. Additionally, should this motion to stay not be granted, the pen register authorized by the Order will be completed upon expiration of the twenty day period and Telephone's right to appeal the final order could be denied by the issue presented becoming moot. It is a crucial matter that Telephone's rights, duties and obligations be determined in this case. To do otherwise will subject Telephone to a continuing pattern of utilization of this procedure by the Government without ever

having the issues raised herein decided.

11. It must be emphasized that Telephone's motion to vacate the March 19, 1976 Order is supported by Telephone's deep concern to provide a public service within the guidelines mandated by Congress. It is Telephone's policy, as required by the Communications Act of 1934, to make every effort to ensure and to protect the privacy of telecommunications. In this nature Telephone serves as a public trustee with an extremely high degree of fiduciary duty. Since Congress has granted this protection to the public, it is Telephone's duty and obligation to contest those measures that unlawfully infringe upon it. This case indicates that federal agencies are disposed to continue seeking pen registers by non-Title III applications. It is obvious that the issues posed will continue to arise between the same parties. It is extremely important to the parties herein, as well as the public interest to have this Honorable Court resolve the questions presented. It is the deep concern of Telephone that the public be protected from potentially unwarranted Government intrusion of the privacy of telecommunications.

12. Telephone will cooperate with the United States to obtain expeditious consideration of the appeal.

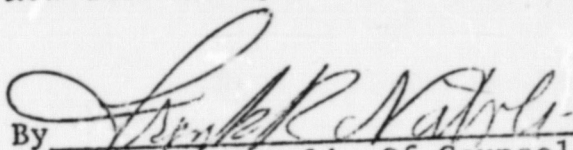
GEORGE E. ASHLEY
Attorney for
NEW YORK TELEPHONE COMPANY
1095 Avenue of the Americas
New York, New York

By 
Frank R. Natoli, Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion to Stay was served by delivering a copy by hand to the office of WILLIAM I. ARONWALD, Esq., Attorney in Charge, United States Department of Justice, Joint Strike Force Against Organized Crime and Racketeers for the Southern District of New York, St. Andrew's Plaza, New York, New York.

GEORGE E. ASHLEY
Attorney for
New York Telephone Company

By 
Frank R. Natoli, Of Counsel

APPLICATION OF THE UNITED STATES
OF AMERICA IN THE MATTER OF AN
ORDER AUTHORIZING THE USE OF A
PEN REGISTER OR SIMILAR MECHANICAL
DEVICE

BEST COPY AVAILABLE

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Misc. No.

19-97(44)

ORDER

AUTHORIZING USE OF A PEN REGISTER

TO: Special Agents of the Federal Bureau of Investigation,
United States Department of Justice

Affidavit having been made before me by Walter F.
Smith, Special Agent of the Federal Bureau of Investigation, United
States Department of Justice, and full consideration having been
given to the matters set forth therein the court finds:

(a) there is probable cause for belief that ~~REDACTED~~
~~REDACTED~~, ~~REDACTED~~ ~~REDACTED~~ ~~REDACTED~~,
~~REDACTED~~ ~~REDACTED~~ (Last Name Unknown), and others
as yet unknown have committed, are committing, and
will continue to commit offenses listed in Section 2516
of Title 18, United States Code, involving the use of
facilities in interstate commerce in order to promote,
manage, establish and carry on an unlawful activity,
to wit: a gambling enterprise in violation of
Section 1952 of Title 18, United States Code, and
are conspiring to commit such an offense in violation
of Section 371 of Title 18, United States Code;

(b) there is probable cause to believe that the tele-
phones subscribed to by ~~REDACTED~~ and located at

~~REDACTED~~, New York, New York, and bearing

telephone numbers (212) ~~REDACTED~~ and (212) ~~REDACTED~~,
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have been, are being, and will continue to be used
by ~~REDACTED~~, ~~REDACTED~~, ~~REDACTED~~ (Last Name
Unknown), and others as yet unknown in commission of
the above described offenses.

WHEREFORE, it is hereby ordered that the New York Telephone
Company, a communication carrier as defined in Section 2510 (10) of
Title 18, United States Code, shall furnish the applicant forth-
with all information, facilities and technical assistance necessary
to accomplish the interception unobtrusively and with a minimum of
interference with the service that such carrier is according the
person whose communications are to be intercepted, the furnishing
of such facilities or technical assistance by the New York
Telephone Company to be compensated for by the applicant at
the prevailing rates.

WHEREFORE, it is further ordered that Special Agents of
the Federal Bureau of Investigation, United States Department
of Justice, are authorized to:

(a) install mechanical devices on the telephones
subscribed to by ~~REDACTED~~ and located at
~~REDACTED~~, New York, New York, and
bearing telephone numbers (212) ~~REDACTED~~ and
(212) ~~REDACTED~~, which telephones have been, are
being, and will continue to be used at said
address.

(b) operate such mechanical device until the
telephone numbers of all outgoing calls dialed
lead to the identities of the associates and
confederates of ~~REDACTED~~, ~~REDACTED~~, ~~REDACTED~~

3.
[REDACTED], [REDACTED] [REDACTED], [REDACTED] (Last Name Unknown),
and [REDACTED] [REDACTED], and their places of operation,
or for a period of twenty (20) days from the date
of this Order, whichever is earlier.

Provided that the operation of this device must
terminate upon attainment of the authorized objective, or in
any event, at the end of twenty (20) days from the date of
this Order.

Dated: March 19, 1976

S/c Charles H. Tenney
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re:

APPLICATION OF THE UNITED STATES
OF AMERICA IN THE MATTER OF AN
ORDER AUTHORIZING THE USE OF A
PEN REGISTER OR SIMILAR MECHANICAL
DEVICE.

ORDER TO SHOW CAUSE

~~WILLIAM F. MCGARTY~~

Misc. No. 19-97(44)

-----X

Upon the annexed affidavits of FRANK R. NATOLI and
WILLIAM F. MCGARTY, duly sworn to the 30th day of March, 1976,
and upon motion of GEORGE E. ASHLEY, attorney for the New York
Telephone Company, *IT IS HEREBY*
ORDERED, THAT
~~LET~~ WILLIAM I. ARONWALD, Attorney in Charge, Joint
Strike Force Against Organized Crime and Racketeers for the
Southern District of New York, show cause before this Court
at a Term for Motions to be held in Room 1105 of the United
States Court House, Foley Square, in the Borough of Manhattan,
City of New York, on the 31st day of March, 1976, at
3:00 p.m. o'clock in the forenoon of that day, or as soon
thereafter as counsel can be heard, why the order of this Court
dated March 19, 1976, directing the New York Telephone Company
to furnish Special Agents of the Federal Bureau of Investigation
with all information, facilities (including lease lines) and
technical assistance necessary to effectively utilize a pen

register, should not be vacated, and why such other and further relief as to this Court may seem just and proper should not be granted.

Sufficient reason appearing therefor, it is

6-11-16
~~ORDERED that pending the hearing of this application,~~
~~the aforementioned order of this Court, be and it hereby is.~~
~~stayed; and it is further~~

ORDERED that sufficient notice of this application shall be deemed to have been given if service of a copy of this Order to Show Cause and the papers upon which it was granted, is made at or before 4:00 PM on the 30th day of March, 1976, personally on WILLIAM I. ARONWALD, Attorney in Charge, Joint Strike Force Against Organized Crime and Racketeers for the Southern District of New York, at St. Andrews Plaza, New York, N.Y.

Dated: New York, New York
 March 30th, 1976

CHARLES H. TENNEY
 U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
APPLICATION OF THE UNITED STATES OF
AMERICA IN THE MATTER OF AN ORDER
AUTHORIZING THE USE OF A PEN REGISTER
OR SIMILAR MECHANICAL DEVICE.
-----X

Misc. No. 19-97(44)

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

FRANK R. NATOLI, being duly sworn, deposes and says:

1. I am employed by New York Telephone Company as a Attorney in the Legal Department, Litigation Section. From time to time during my career in the Legal Department, I have been involved in matters concerning our Security Division and its liaison with law enforcement agencies. I am fully familiar with the facts and prior proceedings herein and make this affidavit in support of Telephone's motion to modify or vacate this Court's order of March 19, 1976, made and entered in this proceeding.

2. Subsequent to March 19, 1976, I was informed by Kenneth J. Lucey, General Litigation Attorney, that a Special Agent of the Federal Bureau of Investigation, United States Department of Justice ("FBI"), had secured an order of this court to place a pen register on certain telephone numbers in the City of New York. I was further advised that Telephone had been served with said order on March 24, 1976, and that it might be

nessary for Telephone to appear in Court to modify or quash the said order.

3. I contacted William F. McGarty, Security Supervisor of Telephone who informed me that Telephone had, after the receipt of the order of March 19, 1976, (annexed hereto as Exhibit I), supplied the FBI with appearance information and/or terminal locations as was orally requested by the FBI Agent.

4. It must be noted that Telephone is further willing to provide the FBI with all information concerning the necessary pair and cable. Once this information is furnished, the FBI will have the full capacity to install a pen register without further assistance of Telephone.

5. The order, however, further directed Telephone to furnish the FBI with facilities which, in common parlance of Telephone terminology, includes lease lines and technical assistance in order to facilitate the installation of a pen register on the subject telephone lines. It is the position of the New York Telephone Company that facilities and technical assistance may only be furnished to law enforcement officials under a Title III application, pursuant to § 18 U.S.C.A., §§ 2510 et seq. (1970) (hereinafter, "Title III"). This section requires

a company such as Telephone to provide whatever technical assistance is necessary in order to permit the Government to install electronic surveillance equipment on telephone lines. Telephone has on several occasions in the past complied with numerous Title III court orders, but has not to my knowledge, furnished said assistance in non-Title III applications.

6. It must be pointed out that although the caption of the order indicates the Government is requiring facilities to install a pen register, the body of the order is worded in such a fashion that it directs Telephone to furnish the FBI with the capability to perform an interception. It is unquestioned that any order directing the interception of communications must be obtained under Title III. It is clear that the instant order was not obtained pursuant to the provisions of Title III. It is a jurisdictional requirement that a Title III order contain the prior approval of the Attorney General or a designated Assistant Attorney General, 18 U.S.C.A. § 2518. On its face the order is void since it does not have such prior approval contained therein. Further, the Court is without authority to compel any interception of communications without a valid Title III application. Accordingly, the instant order was not issued under Title III. Therefore, the Court cannot look to that statute for its

authority to issue the present order.

7. It may be contended that the Court had authority to issue the order pursuant to F. R. Cr. P. 41. This position is similarly untenable. Rule 41 is a codification of the Fourth Amendment to conduct a search and the Court may only authorize a civil officer or other federal law official to effect the search. Rule 41 cannot be construed to compel a private party (Telephone) to actively assist in conducting a search during a criminal investigation. Rule 41 does not authorize the Court to deputize Telephone and it applies only to law enforcement authorities. Further, Rule 41 provides for the search and seizure of "tangible objects." It is seriously doubted that electronic pulses or tones registered by a pen register can be considered "tangible" within the meaning of that Rule.

7. Under the procedure of Rule 41 there must be an execution and a return within 10 days. This order provides for 20 days. Upon the seizure of the property, a receipt is required to be given and an itemized inventory must be made. All of these elements appear lacking in this case. Therefore, Rule 41 does not appear to be the basis for granting the Court jurisdiction to issue the order herein to Telephone.

8. The All Writs Statute cannot confer jurisdiction when the Court has none. Said statute is a non-jurisdictional one.

Hence, before the Court may utilize that statute, it must first find some other basis to grant jurisdiction. It is fundamental that district courts are courts of limited jurisdiction and possess only those powers which are enumerated in Article III of the Constitution of the United States and any additional powers which Congress may grant to them under the Constitution.

9. If there is no statutory authority to issue the present order, the next possibility is that the Court possessed some "inherent authority" to do so. As to this proposition, the Court of Appeals for the 9th Circuit, Application of United States and 8th ^{Distinct} ~~Circuit~~ decision decided January 19, 1976, clearly established that the Court, in a non-Title III application, does not have "inherent authority" to issue an order utilizing use of a pen register by FBI authorities. These findings and the other points covered in the prior paragraphs are covered more fully in a memorandum of law which will be submitted.

10. To compel Telephone to actively assist in a criminal investigation when it refused to do so, absent statutory authority deprives Telephone of its right to refuse without due process of law. Nor can the theory of posse comitatus be applied, since this is not a situation where the FBI is seeking aid to keep

the peace and it is not in pursuit and seeking arrest of a known law breaker. It is only under those situations where said principle might be applied. It has never been applied to compel private persons (Telephone) to help a law enforcement agency to investigate suspected criminals.

11. It must further be noted that if the district court's order of March 19, 1976 is not a "demand of other lawful authority" as required under § 605 Communications Act, then Telephone could be subjected to both civil and criminal liability. For some unexplained reason the Government has decided to proceed with a non-Title III application. It is strange because the crime which is being investigated, namely 18 U.S.C. § 1925, is one of the crimes enumerated in Title III. If the Government would consent to the vacating of the present order, it could obtain all the information, including the lease lines and technical assistance it desires. Courts in several jurisdictions have affirmed the right of the Government to obtain a pen register when used in conjunction with a wiretap order (Title III). In a good faith effort to resolve this matter expeditiously and without prejudice to either the rights of the FBI, Telephone and/or the public, it is suggested to the Court that the Government proceed

by Title III. There appears little reason for the Government to obtain the full wiretap capabilities simply by attempting to obtain a pen register in a non-Title III application. Under a non-Title III application, the Government can circumvent all of the safeguards and requirements of Title III and yet obtain the full capability of wiretapping. Such a procedure certainly is not within the true spirit of the law. Congress intended to protect the Government, Telephone and the public in general by the enactment of Title III. When the Government can utilize Title III, it should be required to do so and not look to cut corners.

12. The issues being presented to this Court are currently pending in a lawsuit before the Court of Appeals, 5th Circuit, Southern Bell v. United States. Oral argument was had before that Court on February 10, 1976, and it is anticipated that a decision will be forthcoming in the very near future. In view of the above, the present order raises very substantial legal questions as to the power of this Court to issue said order. I believe it has been demonstrated that in issuing the order of

March 19, 1976, the Court lacked lawful authority to compel Telephone to provide all information, facilities and technical assistance for a pen register and said order should be vacated.

No further application has been made.

Sworn to before me this
30th day of March, 1976.

Frank R. Natoli

*for Order to show cause is necessary since the
Order has a time limitation of 20 days from
March 19, 1976.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
APPLICATION OF THE UNITED STATES
OF AMERICA IN THE MATTER OF AN
ORDER AUTHORIZING THE USE OF A
PEN REGISTER OR SIMILAR MECHANICAL
DEVICE.

-----X
STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

WILLIAM F. McGARTY, being duly sworn, deposes and says:

1. I am employed by the New York Telephone Company (hereinafter referred to as "Telephone") as Security Supervisor. I have served in various capacities for Telephone in the Plant Department, which installs and repairs communication facilities of Telephone. I have been in the Security Division approximately 8-1/2 years where I served as an Investigator for about two years prior to my promotion to Security Supervisor.

2. In my capacity as Security Supervisor, I am primarily responsible for liaison with all law enforcement authorities - local, state and federal. Based upon my experience, I am thoroughly familiar with the functions and use of a device known as a pen register.

3. A pen register is a mechanical device which is physically connected to the telephone line of a subscriber. It records on paper tape all the numbers dialed from the telephone instrument to which it is connected. It will record all such numbers whether or not the call is answered. The electrical impulses emanating from the use of the dial to which a pen register is attached record markings on paper tape which can be translated into the number dialed.

4. In order to install a pen register, it is only necessary to identify the "pair" (twin wires composing the circuit of a telephone line) and the "cable" in which the pair is located at which access to the subscriber's line may be obtained. In addition, it is necessary to identify the location of "appearances" for such telephone line which are located outside of a subscriber's premises and Telephone's central office. An "appearance", of which there may be several, may be located in the basement of an apartment house, a telephone pole, a rear wall of a building, etc. A pen register may be attached at any of these "appearance" locations.

5. "Leased lines" which are sought in this proceeding are telephone pairs which are made available from one terminal or "appearance" location to another terminal or "appearance" location at a remote place, which remote place can be selected by any person properly ordering leased line facilities. The remote place may be an office, store front, basement, etc., and the leased lines will, of course, transmit any dial pulses or conversation between the two locations as above described.

6. The location of the "appearance", together with the pair and cable information, may be used to eavesdrop and/or install a listening and recording device in such remote places and, with leased lines, eavesdropping and recording may be done at a remote place. It is noted that once a pen register has been installed, a full wiretap "interception" of telephone conversation may be accomplished simply by attaching headphones or a tape recorder to the appropriate terminal on the pen register unit.

7. On March 24, 1976, a copy of an order of this Court, dated March 19, 1976, entered in the above entitled

proceeding was presented to Telephone by Walter F. Smith, Special Agent of the Federal Bureau of Investigation, United States Department of Justice. This order authorized special agents of the Federal Bureau of Investigation to install a pen register on particular telephone numbers in New York City, New York, an area which is serviced by Telephone. Under my supervision Telephone provided the appearance information and/or terminal locations as requested by the agent. We are further willing to provide information concerning the necessary pair, cable and appearance information. This is more fully described in paragraph "6" above. The information which we are willing to furnish is sufficient for the installation of a pen register device and/or the installation of eavesdropping devices. The Federal Bureau of Investigation with the information we are willing to furnish will have the full capacity to install a pen register without any further assistance of Telephone. However, we are not willing to provide facilities (lease lines) as required by said order.

8. The order which was served on March 24, 1976, directed Telephone to furnish "all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the service

that such carrier is according the person whose communications are being intercepted, the furnishing of such facilities or technical assistance by the New York Telephone Company to be compensated for by the applicant at the prevailing rates."

Clearly, the reading of said order is directing Telephone to provide lease lines which I, after consultation with the Legal Department of Telephone, refused to provide in any manner other than that which I have previously indicated, as described in paragraph "7" above. The order is affirmatively directing Telephone to physically set up the facilities (lease lines) and technical assistance which, I am advised by Telephone counsel, is improper, and not under lawful authority.

Sworn to before me this

30th day of March, 1976

William F. McGarty

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

APPLICATION OF THE UNITED STATES OF
AMERICA IN THE MATTER OF AN ORDER
AUTHORIZING THE USE OF A PEN REGISTER
OR SIMILAR MECHANICAL DEVICE.

Misc. No. 19-97(44)

-----X

MEMORANDUM IN SUPPORT OF NEW YORK
TELEPHONE COMPANY'S MOTION TO
VACATE THIS COURT'S ORDER OF MARCH
19, 1976, IN THE ABOVE-ENTITLED
PROCEEDING.

Preliminary Statement

The New York Telephone Company ("Telephone")
submits this memorandum in support of its motion to vacate
or modify the order of this Court dated March 19, 1976,
directing Telephone to provide information, facilities and
other assistance to Special Agents of the Federal Bureau of
Investigation of the United States Department of Justice
("FBI") in connection with the installation and operation
of a pen register on a certain telephone numbers in New
York City, New York.

Statement of Facts*

On March 24, 1976, Telephone was given a copy of

*Based on the accompanying affidavits of Frank R. Natoli and
William F. McGarty dated March 30, 1976.

an order of this Court, by an FBI Agent, to place a pen register on certain telephone numbers in New York City, New York. Telephone supplied the FBI with the appearance information and/or terminal locations as requested by the Agent and is further willing to provide the FBI with the necessary pair and cable information to enable the FBI to install a pen register on the telephone line in question.

However, within said order Telephone was directed to furnish the FBI with facilities (including lease lines) and technical assistance necessary to effectively utilize a pen register or similar mechanical device. As to that portion of the order, Telephone has refused to provide said facilities.

In the judgment of Telephone and its counsel, the order raises substantial legal questions, as to the power of this Court. We believe the issues presented in this case are the following:

1. Does either 18 U.S.C. § 2510 et seq. (Title III) or F.R.Cr. P. 41 authorize the district court to require Telephone to actively assist law enforcement authorities in placing a pen register on particular telephones.
2. Is there "inherent authority" in the district court to compel Telephone to affirmatively assist in the installation and operation of a pen register.

3. In the issuance of this order did the Court exceed its powers as prescribed by Article III of the Constitution of the United States.
4. Does the order violate Telephone's rights under the Fifth Amendment of the Constitution of the United States.
5. Would compliance with this order subject Telephone to civil and/or criminal liability under 18 U.S.C. § 2520, 47 U.S.C. § 605, and 42 U.S.C. § 1983.

It is respectfully noted that in a recent case, In Re Joyce, 506 F. 2d 373, (5th Cir. 1975), the Appellate Court in a factual situation almost identical to this case vacated a contempt penalty entered by a district court on a Telephone Company employee who declined to render assistance in the placement of a non-Title III penregister. The Court in dismissing the contempt charges against the Telephone employee did so without deciding the above issues. However, it did recognize that the above issues were validly raised. In view of the disposition of that case, the Court found it unnecessary to consider the other issues. Following that case, the identical legal issues presented by this order were again presented to the Court of Appeals, 5th Circuit and the matter is presently sub judice in Southern Bell v. United States. Oral argument was held before that Court on February 10, 1976 and it is anticipated that a decision will be forthcoming in the very near future.

Argument

THIS COURT DOES NOT HAVE THE POWER,
WHETHER PURSUANT TO STATUTE, THE
COMMON LAW OR OTHERWISE TO ORDER
TELEPHONE TO FURNISH THE GOVERNMENT
WITH FACILITIES (INCLUDING LEASE
LINES) IN CONNECTION WITH THE IN-
STALLATION OR OPERATION OF A PEN
REGISTER.

It is a well-settled constitutional principal that federal district courts are courts of limited jurisdiction; put differently, the jurisdiction of these courts is limited to that which Congress has granted them pursuant to a valid statute. U.S. Const. Art. III, §§1-2, Lockerty v. Phillips, 319 U.S. 182 (1943). The powers which federal district courts may properly exercise are limited to those specifically granted by statute or implied from such grants. Lockerty v. Phillips, supra; Cary v. Curtis, 44 U.S. 265, 3 How. 236 (1845).

Telephone submits that there is no authority, statutory or otherwise, which this Court could properly invoke to support an order that Telephone furnish the FBI "with all information, facilities (including lease lines) and technical assistance necessary to effectively utilize a pen register or similar mechanical device." See Application of the United States, 427 F. 2d 639 (9th Cir. 1970).

Examined below are three statutes which, albeit erroneously, might be cited in support of the instant order.

The statutes are Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510, et. seq(1970) (hereinafter "Title III"), Rule 41 of the Federal Rules of Criminal Procedure (hereinafter "Rule 41"), and the All Writs Act, 38 U.S.C.A. §1651 (1970). Equally untenable is the proposition that the Court has the "inherent authority" to issue said order.

A. TITLE III DOES NOT SUPPORT
THE INSTANT ORDER

If the order has been issued pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. 2510-2520, the order is defective upon its face.

Title III governs the interception of wire or oral communications, i.e., a "wiretap". It establishes stringent requirements for law enforcement agents who wish to engage in electronic surveillance by requiring, inter alia, the prior approval of the Attorney General, or a designated Assistant Attorney General, and an application to a federal judge for an order authorizing the interception. Moreover, it regulates the scope of the court order and the duration of the electronic surveillance. See 18 U.S.C.A. §2518. It is obvious on its face that the government is not proceeding under Title III, since the prior approval of the Attorney General or a designated Assistant Attorney General is not identified in the order as required by § 18 U.S.C.A. §2518.

As enacted in 1968, Title III did not authorize a court to order a communication carrier, such as Telephone to provide the Government with information, facilities and technical assistance in connection with an interception. Application of the United States, supra. But shortly after the foregoing case was decided, Title III was amended specifically to empower a court to do so. Pub. L. 91-358, Title III, §211(b), July 29, 1970, 84 Stat. 654. Congress enacted this amendment with knowledge that a communication carrier required to furnish the foregoing assistance to the Government in the installation and operation of wiretaps had a complete defense to any civil or criminal action, if the communication carrier acted in good faith reliance on a court order or legislative authorization. See 18 U.S.C.A §2520.

Whatever the coverage of Title III*, the instant order was not issued thereunder and that statutory authority to compel Telephone to furnish services and facilities to the Government is not available to support the challenged order.

* The installation of pen registers is probably not covered by Title III. See United States v. Giordano, 42 U.S.L.W. 4642 (U.S. 1974) (Powell, J., concurring in part and dissenting in part); Cf In re Alpern, 355 F. Supp. 372 (D. Mass. 1973)

The order is further void on its face, since it directs Telephone to furnish the FBI with the capability to perform an interception. It is noted that although the caption of the order indicates a pen register, the body of the order orders something drastically different, namely, a communication interception. It is unquestioned that Telephone may only intercept communications when the order is issued under Title III. The term "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device." 18 U.S.C. §2510.

Concededly, it may be argued that a pen register is not in and of itself an interception. But a direction to intercept is a direction to wiretap in violation of law unless authorized by a Title III order. As previously stated, this is not a Title III order, since the approval of the Attorney General, etc., is not stated in the order and for that reason is jurisdictionally void.

B. RULE 41 DOES NOT SUPPORT
THE INSTANT ORDER

If one assumes a pen register is not subject to Title III, Rule 41 could not authorize a magistrate or court to compel Telephone to execute the Government's search warrant. Rule 41(c), in effect, codifies the law under the Fourth Amendment requiring that a search warrant be directed to "a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States". Assuming that the use of a pen register by law enforcement agents is authorized as an "electronic search" pursuant to a warrant issued under Rule 41, (an assumption which is the subject of dispute and will be discussed hereafter,) said Rule only authorizes a civil officer to effect the search. We submit that the clear language of Rule 41 cannot be construed as requiring active assistance by a private party (Telephone) as ordered by the Court in this case. The courts have no inherent authority to deputize Telephone to assist law enforcement authorities in electronic surveillance. See Application of United States, 427 F 2d 639 (9th Cir. 1970). The order in question directs the New York Telephone Company to furnish facilities (including

lease lines) which would constitute an affirmative act by Telephone of effecting a law enforcement function. Without a Congressional mandate Telephone refuses to become an arm of the Government. It has a Constitutional right to refuse active participation in a criminal investigation.

It must be emphasized that Telephone is willing to furnish the FBI with a pair, cable and appearance information necessary to permit the law enforcement officers to carry on their search. Once said information is furnished, the law enforcement officers will have the full capability to install a pen register and/or eavesdropping device.

The authority for the issuance of this order under Rule 41 is untenable since the procedures outlined under said Rule cannot be complied with. Rule 41 provides for the search and seizure of "property" which is defined to include "documents, books, papers and other tangible objects". The electronic pulses or tones sought and seized by a pen register are, arguably, not tangible objects within the meaning of Rule 41. Under a Rule 41 application there must be an affidavit based upon the probable cause for the issuance of the warrant, it should designate the district judge or commissioner to whom it should be returned, the

execution and return must be within ten days after its date and there must be a complete inventory. It is obvious that the authority for the issuance of the order herein cannot be predicated under Rule 41 since it only applies to a civil officer and must follow each of the requirements within that Rule as stated above. The Rule does not provide for the court to deputize members of the public to join in a search or seizure. Indeed, if the court were to exercise such power under Rule 41, there would be no need for the Rule to name any officer or person to carry out the order. It is respectfully submitted that the Rule does not provide for the Court to require members of the public to join in a search because that power has not been conferred by the Constitution or statute and is not inherent within the Court. See, Application of the United States, 427 F 2d 639 (9th Cir. Ct. of Appeals).

The Court stated:

"We are not convinced that the authority which the Government would have the Court exercise, to compel a telephone company to assist in the investigation of suspected law violators can be derived, by analogy, from the power law enforcement officers may have to assemble a posse comitatus to keep the peace and to pursue and arrest law violators. Nor do we find, outside Title III, any district court authority, statutory

or inherent, for entry of such an order. We think the district court correctly decided that it was without power to grant the relief requested. If the Government must have the right to compel regulated communications carriers to others to provide such assistance, it should address its plea to Congress."

As was stated in Navarro v. U.S., (5th Cir. 1968,) 400 F 2d 316, 318, the Court of Appeals said: "The Rules of Criminal Procedure are not really admonitory. They have the force of law . . . The purpose of Rule 41 is to carry out the mandate of the Fourth Amendment. It binds federal courts and federal law enforcement officers. . . Authority to issue warrants exists only insofar as granted by the rules, and no further." See also, United States v. Haywood, 464 F 2d 756, (D.C. Cir. 1972). In short, Rule 41 affords no authority whatever to a district court to issue an order requiring a telephone company or any other private person to assist in the execution of a wire tap. Indeed, if measured by Congressional intent, it seems clear that electronic search and seizure must be exclusively by 18 U.S.C.A § 2510, et seq.

C. THE ALL WRITS ACT DOES NOT SUPPORT THE INSTANT ORDER.

The All Writs Act, which provides in pertinent part that the federal courts "may issue all writs necessary

or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law" [28 U.S.C.A. §1651(a)], does not support the order issued to Telephone.

The applicability of this statute to the instant case is controlled by Application of the United States, supra. The court there rejected the contention advanced by the Government that, pursuant to the All Writs Act, a court order requiring a communication carrier to provide services, facilities and assistance to the Government would be in aid of the jurisdiction of the Court.

Recently decided by the United States District Court in Kansas City was In re Application of the United States, 44 L.W. 2367 (W.D. Mo. January 19, 1976) where the Court held that the federal courts have no jurisdiction to issue a non-Title III court order authorizing the use of a pen register by federal law enforcement authorities. In reliance upon decisions of the United States Supreme Court, the district judge stated:

"It is settled that this section known as the All Writs Act, by itself, creates no jurisdiction in the district courts. It empowers them only to issue writs in aid of jurisdiction previously acquired on some other independent ground."
44 L.W. 2368.

D. THE COURT LACKS INHERENT AUTHORITY
TO ISSUE SAID ORDER.

Obviously, before a district court may issue an order directing Telephone to provide the Government with information, facilities and technical assistance, it must have a legal basis to do so. As previously stated, district courts are of limited jurisdiction and possess only those powers enumerated in the Constitution and as Congress provides by statute. Further, as observed by Mr. Justice Brandeis,

"There is no federal general common law".
Erie R. Co. v. Tompkins, 304 U.S. 64,
78 (1938).

Title III is the only statute which permits the court to compel Telephone to actively participate in the manner requested in the order. That statute granted immunity to Telephone from both criminal and/or civil liability. 18 U.S.C. § 2518(4) and § 2520. These amendments were made by Congress in 1970 as a result of a decision rendered by United States Court of Appeals for the 9th Circuit, Application of United States, 427 F 2d 639 (1970). In that case the Government applied for a wiretap authorization pursuant to Title III and asked the district court to order the local telephone company to provide facilities, services and technical assistance. The court, in construing the act, held that the statute did not authorize the court to compel the telephone

company to render affirmative assistance to the criminal investigation. It found further that the court did not possess "inherent authority" to compel Telephone to comply. It stated:

"Nor do we find, outside Title III, any district court authority, statutory or inherent, for entry of such an order."

In the 8th Circuit, United States District Court, Kansas City, Missouri, In Re Application of United States, 44 L.W. 2367 (January 19, 1976), the court reaffirmed the above when it stated that the district court, in a non-Title III application, did not have "inherent authority" to issue an order authorizing the use of a pen register by federal law enforcement authorities. The court decided that "neither the Congress nor any Rule of Criminal Procedure has authorized" the use of a pen register outside of a Title III application. The court noted that the All Writs Act by itself creates no jurisdiction in the district court and could not rely upon that statute to confer jurisdiction.

Accordingly, since the order in this case was not obtained under Title III, the court may not look to that statute for its authority to compel the cooperation of Telephone.

Rule 41 affords no authority whatever to a district

court to issue an order requiring Telephone or any other private person to assist in a criminal investigation. Rule 41 can only be directed to an officer of the federal government and the Telephone Company is not such. In addition, the Rule would not apply since it cannot comply with all the proper prerequisites for the issuance of a warrant. When a search warrant is issued, it can only apply to "tangible" objects. It must provide for a return within ten days, a receipt for the property seized must be given and a written inventory must be had.

It is respectfully submitted that if Title III is not applicable and Rule 41 offers no authority, any combination of these statutes would not provide the basis of jurisdiction. Nothing added to nothing equals nothing.

Yet, the 7th Circuit, in United States v. Illinois Bell Telephone Company, decided February 23, 1976, found that the district court had "inherent authority" to issue an order directing the Telephone Company to comply with a pen register order. It is humbly submitted that this decision erroneously applied the law. In that case the Court agreed that Title III could not be used as authority to support the court's jurisdiction. Further, it found that Rule 41 only applied to federal

law enforcement officials. Hence, Rule 41 did not provide the court with the power to compel Illinois Telephone Company to affirmatively assist in the investigation. However, it concluded that if the court under Rule 41 could direct federal agents to conduct a pen register (this is seriously questioned) the court could then compel Telephone to assist them under the All Writs Statute. Obviously, if the court could not compel the Telephone Company to comply with the order directly, it is doubtful that it could acquire jurisdiction by a piecemeal application.

II. THE COURT COULD NOT, IN THE ABSENCE OF STATUTE, COMPEL TELEPHONE TO ACTIVELY PARTICIPATE IN A CRIMINAL INVESTIGATION. TO DO SO VIOLATES TELEPHONE'S CONSTITUTIONAL RIGHTS UNDER DUE PROCESS.

The United States Constitution guarantees, under the Fifth Amendment that

"No person shall be . . . deprived of life, liberty or property without due process of law."

Corporations are entitled to due process protection guaranteed by the Fifth Amendment. See Sinking Fund Cases, 99 U.S. 700, 719 (1878).

To compel Telephone to assist in a criminal investigation when it refuses to do so absent statutory authority, deprives Telephone of its right to refuse without due process of law. In Application of United States, 427 F 2d 639, (1970), the Court clearly indicated that a citizen not part of law enforcement has a right to refuse to actively participate in a criminal investigation. It pointed out that the principle posse comitatus only applies when law enforcement is seeking aid to keep the peace, or in the pursuit and arrest of a known law breaker. The FBI in this case is not seeking aid to arrest a known law breaker, nor is it in hot pursuit of a known violator. The Government merely suspects that a crime is being committed and asks that Telephone be compelled to help it investigate suspected criminals.

Simply put, Telephone will not voluntarily participate during the operation of the pen register by furnishing lease lines. It is the duty of a common carrier to foster and protect the privacy of communications as mandated by 47 U.S.C. §605. By the issuance of a non-Title III pen register order the Government obtains a full wiretap capability without the statutory safeguards which Congress enacted in 18 U.S.C. §2518. Telephone is not accusing the Government that it will misuse the pen register in this case. However, it is strange indeed that the application was made outside Title III. The Government could have proceeded under Title III, since the crime being investigated (18 U.S.C. §1952) is one of the crimes enumerated in Title III. Courts in several decisions affirmed the right of the Government to obtain a pen register when used in conjunction with the wiretap order (Title III). Therefore, if the Government truly needs the assistance of Telephone in providing facilities, let it proceed under Title III. In that way all the safeguards which Congress intended will be utilized, the rights of Telephone will be protected and the interests of the public will not be placed in jeopardy.

See, United States v. Giordano, 416 U.S. 505, 94 S.Ct. 1820, 1843, 1944-1846, 40 L.Ed 2d 341 (1974) (Powell J., concurring in part and dissenting in part); Korman v. United States, 7th Cir. 1973, 486 F. 2d 926, 932; United States v. Lanza, 341 F. Supp. 405, 422 (M.D. Fla. 1922); United States v. King, 335 F. Supp. 523, 548-549 (S.D. Cal. 1971).

III. TELEPHONE'S REASONS FOR NOT COMPLYING
WITH THE ORDER ARE REASONABLE.

It is the position of Telephone that if it were to follow the order as presently constituted, it would be subjected to possible civil or criminal liability. If the district court's March 19, 1976 order is not a "demand of other lawful authority" within § 605, then if telephone complies with the court's order, it does so in violation of § 605. That violation renders Telephone civilly liable under 47 U.S.C. § 206, criminally liable under 47 U.S.C. § 501 for a \$10,000.00 fine and imprisonment for one year, and conceivably liable under 47 U.S.C. § 502 as well.

Another alternative liability theory could be stated under the Civil Rights Act, 42 U.S.C. § 1983. If Telephone complies with the district court's order its action would be "under color of law." If the March 19, 1976 order is unlawful, as contended by Telephone, the pen register surveillance could constitute deprivation of a right secured by the Communications Act for purposes of stating a cause of action under the Civil Rights Act.

If the Department of Justice feels that pen register surveillance is vital to its investigatory functions, it can ask Congress to authorize such. It is our understanding that

in response to requests from both the National Wiretap Commission and the Congress to recommend changes in Title 18, ch. 119, the Department of Justice has not requested that the courts be statutorily empowered to direct telephone company assistance in pen register situations. For example, in his appearance on July 27, 1975 before the Commission, in behalf of the Department of Justice, Mr. James Reynolds of the General Crimes Section of the Criminal Division submitted several suggestions for changes in Title III; however the pen register question was not raised.

Conclusion

Wherefore, it is respectfully requested that the order dated March 19, 1976 be vacated in its entirety or vacating that part of the order directing the New York Telephone Company to furnish facilities and technical assistance.

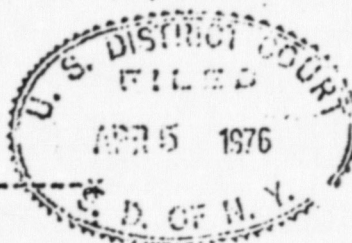
Respectfully submitted,

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Frank R. Natoli
Of Counsel

copy # 44111

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



IN RE:

APPLICATION OF THE UNITED STATES : Misc. No. 19-97(44)
OF AMERICA IN THE MATTER OF AN :
ORDER AUTHORIZING THE USE OF A :
PEN REGISTER OR SIMILAR MECHANICAL :
DEVICE. : MEMORANDUM

APPEARANCES

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TENNEY, J.

On March 19, 1976, this Court granted the application of the Department of Justice ^{1/} for an order directing New York Telephone Company ^{2/} ("Telephone") to furnish the information, facilities, and technical assistance necessary to enable agents of the Federal Bureau of Investigation ("FBI") to install "pen registers" on two telephones. The application specified two

telephones subscribed to by a specified individual and located at a specific address. In response to the Court's order, Telephone moved, by order to show cause, to vacate or to modify the order. While not contesting the right of the Government to employ the "pen register", Telephone objected to so much of the Court's order as directed it to provide all information, facilities (including lease lines), and technical assistance necessary for the utilization of the "pen register".

Based upon the papers submitted and the arguments heard and for the reasons stated below, the motion to vacate or modify this Court's previous order is hereby denied.

Telephone challenges the Court's direction that it furnish technical assistance, including lease lines, to law enforcement officials for installation and utilization of the "pen register". Telephone does not challenge the Court's jurisdiction to authorize use of the "pen register", nor does it contend that there was no probable cause supporting the Court's order. Indeed, Telephone has been willing and continues to be willing to provide the Government with all the necessary information that would enable the FBI to install a "pen register". It is Telephone's position, however, that its facilities and technical assistance may be furnished to law enforcement officials only pursuant to an application under 18 U.S.C. §§ 2510 et seq. These sections constitute Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III").

Title III "prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses." United States v. Giordano, 416 U.S. 505, 507 (1974). Briefly, the Act confers power upon the Attorney General or a specially designated Assistant Attorney General to apply for a federal court order authorizing wire interceptions. 18 U.S.C. § 2516(1).

A "pen register" is a mechanical device which picks up electrical impulses which are used to decode the telephone numbers dialed in outgoing calls.^{3/} Telephone concedes that the application for a "pen register" is not an application for a wire or oral interception within the purview of Title III. (Telephone's Memorandum of Law at 5).

There is significant authority for this Court to find that the "pen register" in this instance was not a device for wire or oral interception covered by the prescriptions of Title III. 18 U.S.C. § 2510 contains the following definition:

"As used in this chapter--

(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

"Aural" has been defined as "of or relating to the sense of hearing." United States v. Focarile, 340 F. Supp. 1033, 1039 (E.D. Mo.), aff'd sub nom. United States v. Giordano, 459 F.2d 522 (3rd Cir. 1972), aff'd, 416 U.S. 505 (1974), quoting

Webster's Third New International Dictionary. A "pen register" decodes phone numbers by responding to electric impulses and not to aural stimuli.

The legislative history of Title III clearly discloses a Congressional intent to exclude "pen registers" from the Act's strictures.

"Paragraph (4) defines 'intercept' to include the aural acquisition of the contents of any wire or oral communication by any electronic, mechanical, or other device. Other forms of surveillance are not within the proposed legislation. See Lee v. United States, 47 S.Ct. 746, 274 U.S. 559 [71 L.Ed. 1202] (1927); Cornfeld v. United States, 367 F.2d [1] (9th Cir. 1956). An examination of telephone company records by law enforcement agents in the regular course of their duties would be lawful because it would not be an 'interception.' (United States v. Russo, 250 F.Supp. 55 (E.D.Pa. 1966)). The proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register' for example, would be permissible. See United States v. ... 175 (7th Cir. 1953). The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication." (emphasis added). S. Rep. No. 1097, 90th Cong., 2d Sess. at 90 (1963), 1963 U.S. Code Cong. & Admin. News, p. 2173.

Various federal courts have adopted the position that a "pen register" device is not governed by Title III. See United States v. Illinois Bell Telephone Co., No. 75-1909 (7th Cir., February 23, 1976), at 3; United States v. Clegg, 509 F.2d 605, 610 (5th Cir. 1975); United States v. Falcone, 505 F.2d 478, 482 (3d Cir. 1974), cert. denied, 423 U.S. 935 (1975); United States v. Flan, 502 F.2d 931, 942 (7th Cir. 1974);

United States v. Brick, 502 F.2d 219, 223 (8th Cir. 1974);
Korman v. United States, 486 F.2d 926, 931 (7th Cir. 1973);
United States v. King, 335 F. Supp. 523 (S.D. Cal. 1971), aff'd
in part, rev'd in part on other grounds, 478 F.2d 494 (9th Cir.
 1973), cert. denied, 417 U.S. 920 (1974); United States v. "
Vega, 52 F.R.D. 503 (E.D.N.Y. 1971). Finally, Mr. Justice
 Powell reiterated this conclusion in his opinion (concurring
 in part and dissenting in part) joined by The Chief Justice
 and Mr. Justice Blackmun and Mr. Justice Rehnquist in United
States v. Giordano, supra, 416 U.S. at 553-54.^{4/} This Court
 likewise holds that a "pen register" falls outside of Title
 III's definition of "interception".

Without disputing the nonapplicability of Title III,
 Telephone contends, however, that this Court's order authoriz-
 ing the use of a "pen register" device "directs Telephone to
 furnish the FBI with the capability to perform an interception"
 (Natoli Affidavit at 3), and that a court order directing an
 interception must comply with the strictures of Title III.
 (Natoli Affidavit at 3; Telephone Memorandum of Law at 7).
 Although the order employs the term "interception", it clearly
 does not direct that type of interception contemplated by
 Title III. The order specifically permits only that inter-
 ference, from the installation and operation of the device,
 necessary for the limited purpose of obtaining the telephone
 numbers of outgoing calls.

This Court adopts the jurisdictional basis for the issuance of a "pen register" that was enunciated by Mr. Justice Powell in the Giordano case. The minority opinion explained that

"[b]ecause a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment. In this case the Government secured a court order, the equivalent for this purpose of a search warrant, for each of the two extensions of its authorization to use a pen register." United States v. Giordano, supra, 416 U.S. at 554.

The minority noted further:

"The Government suggests that the use of a pen register may not constitute a search within the meaning of the Fourth Amendment. I need not address this question, for in my view the constitutional guarantee, assuming its applicability, was satisfied in this case." Id. at n.4.5/

Telephone does not contest the existence of probable cause underlying the issuance of the court order. The "pen register" was ordered pursuant to affidavits concerning an on-going investigation of a criminal operation for which a wiretap order had been previously authorized under Title III. This investigation, then, concerns an offense deemed serious enough to justify a Title III interception. Refusal of Telephone to assist in furnishing technical assistance and facilities would frustrate the operation of the court order, properly granted upon a showing of probable cause.

On facts substantially similar to those in the instant case, the Seventh Circuit Court of Appeals cogently reconciled Mr. Justice Powell's minority opinion with that of the majority in the Giordano case.

"There seems nothing essentially inconsistent with this order-application accommodation in the majority opinion which rejected the evidence obtained from the use of the pen register, not because of a lack of judicial authority to issue the form of order used, but the evidence was '... derived from ... [an] invalid wire interception. ...' 416 U.S. at 511 n. 2 and 533-34 n. 19. Apparently, Fed. R. Cr. P. 41, which deals with the traditional concept of search and seizure and which lodges jurisdiction and authority in the district courts to issue search warrants to search and seize 'tangible' objects was not thought by the Supreme Court to be a limitation upon the power of the district court to authorize, outside Title III, reasonable use of investigative techniques rendered possible by modern technology as to 'nontangibles'. The commonsense approach used by the district court in issuing an order based on probable cause and following a procedure designed to comply with Fourth Amendment considerations in authorizing the use by the government of the pen register was a valid exercise of authority." United States v. Illinois Bell Telephone Co., supra, No. 75-1909, at 5.

Finding jurisdiction for issuance of the court order under this "commonsense approach," the Seventh Circuit likewise found "inherent authority" for the district court to direct Illinois Bell's compliance with and assistance in the installation of a "pen register" by federal law enforcement agents. The court concluded that

"district courts in the area of electronic surveillance, inherently have power to effectively compel compliance with validly issued orders. It seems

more congruent with both reason and Congressional intent to have courts, rather than the telephone company, decide if a pen register should or should not be used. The authority to compel the cooperation of the telephone company is in a sense concomitant of the power to authorize the installation of a pen register, for without the former the latter would be worthless.

"It is conceded that the district court had authority to enter an order authorizing government law enforcement agents to employ a pen register. Therefore, analogous authority for the proposition that the telephone company cannot frustrate the exercise of the district court's order by refusing to make available its facilities and knowhow, is the All Writs Act. The All Writs Act, 28 U.S.C. § 1651 provides in pertinent part:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

This statute allows a district court to defend a proper exercise of its [sic] jurisdiction, although it does not supply jurisdiction." Id. at 7-8.

This Court adopts the sound reasoning of the Seventh Circuit and holds that it possesses inherent jurisdiction to direct Telephone's compliance with the order. Furthermore, this Court finds jurisdiction for its directive under the All Writs Act. The mandate to Telephone is necessary to protect and effectuate the purpose of the concededly valid "pen register" order.

Accordingly, the application of Telephone to vacate or modify this Court's order authorizing the use of a "pen register" is in all respects denied.

So ordered.

Dated: New York, New York

April 2, 1976

CHARLES H. TENNEY

U.S.D.J.

IN RE:
 APPLICATION OF THE UNITED STATES
 OF AMERICA IN THE MATTER OF AN
 ORDER AUTHORIZING THE USE OF A
 PEN REGISTER OR SIMILAR MECHANICAL
 DEVICE.

Misc. No. 19-97(44)

FOOTNOTES

- 1/ The Government's application was submitted by Peter D. Sudler, a Special Attorney of the United States Department of Justice, New York Joint Strike Force Against Organized Crime. The application was supported by the affidavit of Walter F. Smith, a Special Agent of the Federal Bureau of Investigation.
- 2/ New York Telephone Company is a communications common carrier as defined in 18 U.S.C. § 2510(10).
- 3/ A "pen register" is more fully defined and explained as follows:

"A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. The mechanical complexities of a pen register are explicated in the opinion of the District Court, 340 F. Supp. 1033, 1033-1041 (S.D. 1972)." United States v. Giordano, supra, 416 U.S. at 549 n.1.

- 4/ In United States v. Giordano, supra, 416 U.S. 505, a Title III interception order was improperly obtained by an unauthorized official. The Supreme Court approved the suppression of all evidence resulting from the unlawful wiretap. Information revealed from the wiretap had formed the basis of probable cause upon which "pen registers" were subsequently authorized. The Court concluded that evidence resulting from the "pen registers" was tainted by its in-

FOOTNOTES

direct connection with the unlawful wiretap, and was therefore inadmissible under a "fruit of the poisonous tree" rationale.

One court has observed that the substance of the minority opinion is not inconsistent with the majority holding. See discussion in text p. 7, infra.

- 5/ Accord, United States v. Fann, supra, 502 F.2d at 940; United States v. Wick, supra, 502 F.2d at 223-24. But see United States v. Clay, supra, 509 F.2d at 610, holding that a "pen register" does not involve a "search" within the scope of the Fourth Amendment.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X	
IN Re APPLICATION OF THE UNITED	:
STATES OF AMERICA IN THE MATTER	:
OF AN ORDER AUTHORIZING THE USE	:
OF A PEN REGISTER OR SIMILAR	:
MECHANICAL DEVICE.	:
-----X	

AFFIDAVIT IN OPPOSITION
TO MOTION FOR A STAY

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

PETER D. SUDLER, being duly sworn, deposes and says:

1. I am a Special Attorney with the United States Department of Justice assigned to the New York Strike Force against Organized Crime and Racketeering for the Southern District of New York. I am the attorney in charge of the underlying investigation pursuant to which Judge Tenney issued the March 19, 1976 order authorizing the use of the pen register in question.

2. I make this affidavit in opposition to the motion for a stay of both Judge Tenney's orders of March 19, 1976 and April 2, 1976 directing the New York Telephone Company to furnish information, facilities, and technical assistance (including lease lines) necessary to enable agents of the Federal Bureau of Investigation to install pen registers on two telephones.

3. Aside from relying on the opinion of the District Court (attached hereto as Exhibit A), the government will rely upon its memorandum of law and accompanying affidavits (attached hereto as Exhibit B) submitted to the District Court in opposition to the Telephone Company's motion to vacate the March 19, 1976 order.

2.

The government will therefore not repeat, in this affidavit, arguments and recitations of fact made to the District Court which are contained in Exhibit B, but will confine itself to pertinent issues relating solely to the motion now before this Court for a stay.

4. On April 9, 1976, the March 19, 1976 order of the District Court authorizing the use of a pen register will expire. Assuming that the telephone company's motion for a stay is denied by this Court, the government will then be in the position of having to again go before the District Court to apply for a new order authorizing the use of a pen register. Whether such an order would be granted in a matter of conjecture. It is not known whether probable cause of a sufficiently updated nature would exist to justify a new order. It is not known whether the gambling operation being investigated will still be operating at the same location and over the same telephone lines as those specified in the March 19, 1976 order. It is significant that this gambling operation has a prior history of frequent changes of location and telephone numbers.

5. Accordingly, the government has already been, and will continue to be severely prejudiced, by the actions of the telephone company in refusing to obey the order of the District Court, even if this Court now denies the motion for a stay and eventually affirms Judge Tenney. There could be no better demonstration of the potential for frustration of legitimate law enforcement objectives than allowing the telephone company to pick and choose which Court orders it will obey and which it will not, than this case. By its actions here the telephone company has already brought to a complete halt an ongoing criminal investigation.

6. The most ironical aspect of this case, from the government's view, is the telephone company's position that the utilization of a pen register would result in an invasion of privacy. The device of a pen register, when installed, merely permits discovery of the number of other telephone installations dialed from the instrument to which it is attached. It should be noted that upon the issuance of a grand jury subpoena, the government can obtain toll records of all long distance calls made from any telephone installation. However where, as here, the telephone company does not keep Message Unit Detail service, the government is forced to utilize the pen register device in order to determine what telephones are being called within the Message Unit area. From a commonsense point of view the question may well be asked why, if the government can obtain long distance records by subpoena, should it be required that an order in the nature of a search warrant be obtained to gain access to local toll records? Although the question is probably irrelevant since the government here did obtain an order in the nature of a search warrant, thus satisfying all fourth amendment considerations, nevertheless it points out the frivolity of the telephone company's position that a pen register constitutes an invasion of privacy.

7. In conclusion, it is anticipated by the government, that the telephone company will argue that if the stay is denied and compliance with the District Court's order is made, the appeal will become moot. The government contends that if this Court were to deny this motion for a stay, appellate review of the District Court's decision would still be available under

the theory that this situation is capable of repetition, yet would evade review. See Roe v. Wade, 410 U.S. 113 (1973); Moore v. Ogilvie, 394 U.S. 814, 816 (1969).

WHEREFORE, it is respectfully requested that the motion for a stay be denied.

Peter D. Sudler

PETER D. SUDLER
Special Attorney
U.S. Department of Justice

Subscribed and sworn to before
me this 7th day of April, 1976.

Steven K. Franklin

NOTARY PUBLIC

STEVEN K. FRANKLIN
Notary Public, State of New York
No. 24-4607105
Qualified in Kings County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
APPLICATION OF THE UNITED STATES

OF AMERICA IN THE MATTER OF AN

ORDER AUTHORIZING THE USE OF A

PEN REGISTER OR SIMILAR MECHANICAL

DEVICE
-----X

MISC. No. 19-97(44)

ORDER

EXTENDING THE TIME FOR USE OF A PEN REGISTER

IT IS HEREBY ORDERED that the Order of the District Court (attached hereto as Exhibit A) is amended to extend the period of time for which utilization of the pen register may be made from twenty (20) days to forty (40) days, or upon attainment of the authorized objective, whichever occurs earlier.

Dated: April 9, 1976

New York, New York

S/ Morris E. Lick
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

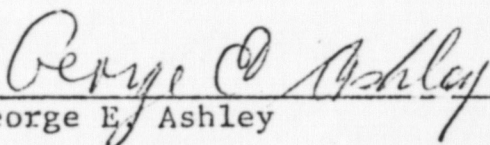
-----X
IN RE APPLICATION OF THE UNITED STATES
OF AMERICA IN THE MATTER OF AN ORDER
AUTHORIZING THE USE OF A PEN REGISTER
OR SIMILAR MECHANICAL DEVICE.
-----X

Misc. No. 19-97(44)

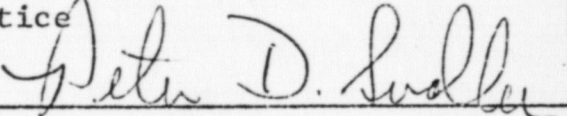
STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the annexed copy of Judge Tenney's Order of March 19, 1976, with appropriate confidential portions deleted, will be submitted with the Record on Appeal in lieu of the original signed Order which is presently under Court seal.

Dated: New York, New York
April 12, 1976.


George E. Ashley

United States Department of
Justice

By: 

PETER SUDLER
SPECIAL ATTORNEY

AFFIDAVIT OF SERVICE

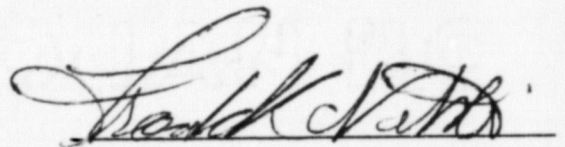
STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

FRANK R. NATOLI, being duly sworn deposes and
says:

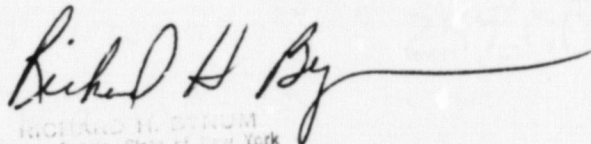
That on this 12th day of April, 1976, a true
copy of the foregoing appendix to brief of appellant NEW
YORK TELEPHONE COMPANY was delivered to the office of
WILLIAM I. ARONWALD, Attorney in charge of United States
Department of Justice, Joint Strike Force Against Organized
Crime, at 1 St. Andrews Plaza, New York, New York.

Sworn to before me this

12th day of April, 1976



FRANK R. NATOLI



RICHARD H. BYRUM
Notary Public, State of New York
No. 03-0526610
Qualified in Essex County
Commission Expires March 30, 1977